# RECORD, CASE No. 13,770.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1891.**

TERM No., 515.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

ALFRED M. HOYT, THEODORE I. HUSTED, LEONARD HAZELTINE, AND G. L. DUNLAP, SURVIVORS OF JESSE HOYT AND PERRY H. SMITH, DECEASED, FOR THE USE OF MUNGER, WHEELER & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, judge of the circuit court of the United States for the seventh judicial circuit, on Tuesday, the first day of October, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and fourteenth year.

WM. H. BRADLEY, *Clerk.*

ALFRED M. HOYT, THEODORE I. HUSTED, LEONARD Hazeltine, and G. L. Dunlap, Survivors of Jesse Hoyt and Perry H. Smith, Deceased, for the Use of Munger, Wheeler and Company,
*vs.*
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. } Covenant.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the eighth day of September, 1888, came the defendant, by its attorney, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its bond for costs and transcript of record from the superior court of Cook county,
2 Illinois, in said above-entitled cause; which said bond and record are in the words and figures following, to wit:

*Bond for Costs.*

UNITED STATES OF AMERICA,
*Northern District of Illinois,* } *ss:*

Circuit Court, October Term, A. D. 1888.

ALFRED M. HOYT *et al.*, for the Use of Munger, Wheeler & Co.,
*vs.*
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. } In Assumpsit.

I do hereby enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by me I hereby agree and stipulate that execution may issue against my property for any costs taxed against me.

Dated this eighth day of September, A. D. 1888.

E. WALKER.

(Endorsed:) Filed Sept. 8th, A. D. 1888. Wm. H. Bradley, clerk.

3 UNITED STATES OF AMERICA, } ss:
*State of Illinois, County of Cook,* }

Pleas before the Honorable Joseph E. Gary, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court at a regular term of said superior court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the second day, of July, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and twelfth.

Present: The Honorable Joseph E. Gary, judge of the superior court of Cook county; Joel M. Longnecker, State's attorney; Canute R. Matson, sheriff of Cook county.

Attest: PATRICK McGRATH, *Clerk.*

Be it remembered that heretofore, to wit, on the 26th day of May, in the year of our Lord one thousand eight hundred and eighty-eight, there was filed in the office of the superior court of Cook county a certain præcipe for summons, which is in words and figures as follows, to wit:

4 STATE OF ILLINOIS, } ss:
*County of Cook,* }

In the Superior Court of Cook County, to the July Term, A. D. 1888.

ALFRED M. HOYT, THEODORE I. HUSTED, LEONARD Hazeltine, and George L. Dunlap, Survivors of Jesse Hoyt and Perry H. Smith, Deceased, for the Use of Munger, Wheeler & Co.,
*vs.*
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. } Assumpsit.

To the clerk of said court:

Please issue a summons to the defendant in the above-entitled cause in an action of trespass on the case upon promises, damages one hundred thousand dollars (100,000), returnable to the next July term of said court.

Chicago, May 26th, 1888.

JNO. N. JEWETT &
JEWETT BROS.,
*Att'ys for Plaintiffs.*

And on the day and year last aforesaid, to wit, on the 26th day of May, 1888, there issued out of the office of the clerk of said court the people's writ of summons, with the return of the sheriff thereon indorsed, — is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
*Cook County,* }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon the "Chicago, Milwaukee and St. Paul Railway Company," if it shall be found in your county, personally to be and appear before the superior court of Cook county on the first day of the term thereof to be holden at the court-house, in the city of Chicago, in said Cook county, on the first Monday of July next, to answer unto Alfred M. Hoyt, Theodore I. Husted, Leonard Hazeltine, and George L. Dunlap, survivors of Jesse Hoyt and Perry H. Smith, deceased, for the use of Munger, Wheeler & Co., in a plea of trespass on the case upon promises, to the damage of said plaintiffs, as it is said, in the sum of one hundred thousand dollars; and have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness Patrick McGrath, clerk of our said court, and [SEAL.] the seal thereof, at Chicago aforesaid, this 26th day of May, A. D. 1888.

PATRICK McGRATH, *Clerk.*

P'd, 1.00.

Served this writ on the within-named defendant, The Chicago, Milwaukee & St. Paul Railway Company, by delivering a copy thereof to Edwin Walker, the solicitor of said company, the 28th day of May, 1888. The president of said company not found in my county.

CANUTE R. MATSON, *Sheriff,*
By HENRY SPEARS, *Deputy.*

And afterwards, to wit, on the 28th day of June, A. D. 1888, there was filed in the office of the clerk of said court a certain stipulation, which is in words and figures as follows, to wit:

In the Superior Court of Cook County, State of Illinois.

ALFRED M. HOYT *et al.*
*vs.*
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

It is hereby stipulated and agreed that the form of action in said cause may, upon motion of the plaintiffs therein, be changed from an action on the case upon promises to an action of covenant without notice to said defendant.

Chicago, June 26th, 1888.

JNO. W. JEWETT &
JEWETT & BROS.,
*Att'ys for Pl't'fs.*
E. WALKER,
*Att'y for Def'd't.*

And afterwards, to wit, on the 29th day of June, A. D. 1888, the same being one of the days of the June term of said court,
7 the following, among other, proceedings were had in said court and entered of record, to wit:

ALFRED M. HOYT *et al.*, Use, &c.,
*vs.*
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. } 116,347. Assumpsit.

On the stipulation of the parties to this suit this day filed, it is ordered that all papers and proceedings in this cause be, and are hereby, amended by changing the form of action to covenant.

And afterwards, to wit, on the day and year last aforesaid, to wit, the 29th day of June, A. D. 1888, there was filed in the office of the clerk of said court a certain declaration, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss*:
*County of Cook*, }

In the Superior Court of said County, to the July Term, A. D. 1888.

Alfred M. Hoyt, Theodore I. Husted, Leonard Hazeltine, and George L. Dunlap, survivors of Jesse Hoyt and Perry H. Smith, deceased, plaintiffs in this suit, who sue for the use of
8 Munger, Wheeler & Co., by Jno. N. Jewett and Jewett Bros., their attorneys, complain of the Chicago, Milwaukee and St. Paul Railway Company, a corporation defendant in this suit, which has been duly summoned, &c., of a plea of breach of covenant—

For that whereas, heretofore, to wit, on the 18th day of February, in the year of our Lord one thousand eight hundred and eighty (A. D. 1880), at Chicago, to wit, at the county aforesaid, the said plaintiffs and said Jesse Hoyt and Perry H. Smith, then living, but now deceased, as parties of the second part, and the said defendant, by and through its proper officers and under its corporate seal, as party of the first part, made and entered into an indenture of lease and agreement in the words and figures and of the tenor and effect following—that is to say:

"This agreement, made this eighteenth day of February, A. D. 1880, between the Chicago, Milwaukee and St. Paul Railway Company, party of the first part, and Jesse Hoyt, Alfred M. Hoyt, Theodore I. Husted, and Leonard Hazeltine, doing business under the firm name and style of Jesse Hoyt and Company, of the city of New York, and Perry H. Smith and George L. Dunlap, of the city of Chicago, parties of the second part, witnesseth:

1. The said party of the first part hereby leases, demises, and lets for the period of ten (10) years from the first day of January,
9 1881, to the said parties of the second part lots three (3), four (4), and five (5) of block K of the original town of Chicago, at an annual rental of three thousand and eight hundred and fifty

(3,850) dollars, to be paid quarterly on the first day of January, April, July, and October of each year, together with all taxes and assessments that may be levied upon said premises during the term of said lease.

2. The said parties of the second part agree to erect, build, and construct on said lots three (3), four (4), and five (5) a grain elevator of the capacity of seven hundred thousand (700,000) bushels or more during the year 1880, and further agree to complete the same ready for business with all reasonable dispatch; said elevator to be constructed in the usual manner of grain elevators in the city of Chicago and in all respects to be a first-class elevator, with suitable and proper foundations and machinery, with proper bins for storing different kinds of grain and different grades, and with all the modern improvements and appurtenances of a first-class elevator for the transaction of the business of receiving, storing, and discharging grains, and to be constructed to the satisfaction of the said party of the first part in these respects.

3. The said party of the first part agrees to lay all necessary tracks adjacent to said elevator to connect its railway therewith for the purpose of delivering grain in cars thereto and keep the same in repair during the time of this lease, and agrees to deliver on said tracks, in cars, at said elevator to the parties of the second part all the grain that may be brought by its railway consigned to parties in the city of Chicago, so far as the party of the first part can legally control the same, for handling and storage in said elevator.

4. The said parties of the second part agree to receive, handle, and store said grain as delivered in the usual manner of handling grain in the city of Chicago to the extent of the capacity of said elevator so to be constructed, and in addition agree that they will use for the same purpose, so far as their other engagements will allow, the elevator now standing on lots one (1) and two (2) of said block, and that said party of the first part shall at all times be entitled to storage for its grain to the extent of at least one million (1,000,000) bushels.

The parties of the second part, with the consent of the party of the first part, may receive grain for storage from other parties and from river and canal craft, but in case such grain is so received so as to reduce the capacity of the parties of the second part to accommodate the party of the first part to the extent of one million (1,000,000) bushels in said elevators the said parties of the second part agree to furnish storage in other elevators to the party of the first part to the extent that their capacity is so reduced, without expense to the said party of the first part for switching or otherwise.

5. It is mutually agreed between said parties that the said parties of the second part may charge for said storage and handling a rate not exceeding one and one-fourth (1¼) cents per bushel for first storage, provided such rate is allowed by law and does not exceed the customary rate charged by the elevators transacting the business of competing roads in the city of Chicago, to wit, the Chicago

and Northwestern railway, the Illinois Central railway, the Chicago, Rock Island and Pacific railway, and the Chicago, Burlington and Quincy railway; and it is further mutually agreed that the charge for first and other storage to be made by the parties of the second part shall at all times during the continuance of this lease be the same as the storage regularly charged in the city of Chicago by the elevators above mentioned, not exceeding, however, the rate of (1¼) cents per bushel for first storage; but in case first storage (for ten days) shall be reduced below one cent per bushel for any cause and said parties of the second part shall in writing request the same to be raised to one cent per bushel, the party of the first part
12 shall, within ten (10) days after receiving such request, elect either to pay one cent per bushel for first storage or to terminate the said contract and take and pay for said elevators and real estate, as hereinafter provided.

6. It is further mutually agreed that in case of the destruction of the elevators now standing in said lots or of the elevator to be built by said parties of the second part by fire or other casualty that the same shall be rebuilt by the parties of the second part with all reasonable despatch; and it is further agreed that said parties of the second part will save the said party of the first part free and harmless from all loss or damage by fire to said elevator or contents during the continuance of this lease from any cause whatever.

7. It is further mutually agreed that in case the law requiring weighers to be appointed by the State should be repealed and such weighers are appointed by the parties of the second part and complaint shall then be made to the party of the first part as to the correctness or manner of weighing grain, or if the said party of the first part shall be dissatisfied with the action of the parties of the second part in that respect, that the party of the first part may appoint weighers to attend to the weighing of all grains into and out
13 of said elevators, and that the said parties of the second part will pay the parties so appointed for their services and pay all expense of said weighing. It is further agreed that the parties of the second part will at all times keep a force at said elevators sufficient to transact all business that may be offered by the said party of the first part, and that cars of grain will be received and unloaded when the business of the party of the first part requires it, in the night time or on Sundays, and that said business shall be dispatched with equal and as great facility in that respect as at any of the elevators in the city of Chicago above mentioned, so as not to delay the cars of the party of the first part unreasonably or unnecessarily.

8. In consideration of the agreement aforesaid the said party of the first part agrees that the total amount of grain received at said elevator shall be at least five million bushels on an average for each year during the term of this lease, and in case it shall fall short of that amount the said party of the first part agrees to pay to the said parties of the second part one cent per bushel on the amount of such deficiency, settlements to be made at the close of each year, and whenever it shall appear at the close of any year that the total
14 grain received during so much of this lease as shall then have

elapsed does not amount to an average of five million bushels for each year the party of the first part shall pay to the parties of the second part one cent per bushel for the amount of such deficiency, but in case it shall afterwards appear that the total amount received up to that time equals or exceeds the average amount of five million bushels per annum the amount so paid to the parties of the second part shall be refunded or so much thereof as the receipts of the year shall have exceeded five million bushels, so that the whole amount paid on account of deficiency shall be refunded should the total receipts for the entire term equal or exceed fifty million bushels in all on an average of five million bushels for each year.

9. In addition to the rent above reserved, the said parties of the second part agree to pay all taxes and assessments that may be levied upon said premises during the term hereby demised, to keep said buildings and the docks in front thereof in proper repair and condition for the transaction of business at said elevators, and that the business of the party of the first part shall at all times be transacted with expedition and with as much facility as similar business is transacted at any of the elevators above named.

10. It is further mutually agreed that all line cars for shipments of grain out from the elevators are to have free access over the track of the party of the first part on as favorable terms as are granted them at the other elevators above mentioned; and, further, in case the said party of the first part shall require additional storage exceeding said one million bushels on the amount that can be furnished by the said parties of the second part at both the elevators on the lots above described, to wit, the elevator now standing on lots one and two of block K and the one to be built, that the party of the first part shall give to the parties of the second part the option of furnishing said storage on the terms herein prescribed.

And it is further mutually agreed that said business of handling and storing said grain shall be done in the usual manner of transacting such business in the city of Chicago in all respects and to the satisfaction of the superintendent of the said party of the first part; but in case the said party of the first part shall, in writing, notify the parties of the second part that the first party requires additional storage, as above provided, and shall furnish the proper grounds therefor at an annual rental of seven per cent. per annum on an amount equal to the cost thereof, together with taxes and assessments, and the parties of the second part shall decline or fail to furnish it within a reasonable time, the party of the first part may elect to terminate this contract on account of such failure, and in that event the party of the first part shall take the said lots one (1) and two (2) of block K and the elevator now standing thereon, together with the elevator to be constructed on the lots hereby demised, in the manner and on the terms hereinafter provided, and on receiving payment, as hereinafter provided, the second parties agree to make a conveyance of said lots one (1) and two (2) of block K and of the elevator standing thereon, and also the elevator to be constructed on lots three (3), four (4), and five (5) of said block K, free

and clear of all encumbrances, to the party of the first part and surrender possession thereof to it.

11. It is further mutually agreed and understood that as much of lots — (3), four (4), and five (5) of said block K as is not required for the uses, purposes, and operation of the elevator to be constructed by the parties of the second part may be used by the party of the first part during the continuance of this contract for railroad tracks and other purposes connected with its business.

12. It is further mutually agreed that at the expiration or sooner termination of this lease the said party of the first part, unless by mutual consent this lease is renewed for an additional term, shall purchase the elevator now standing on lots one (1) and two (2), together with said lots, and also the elevator to be constructed on lots three (3), four (4), and five (5), and also any additional elevator that may be built under the terms of this agreement, at their then value in cash, and if the parties hereto are unable to agree upon the price to be paid therefor the same shall be fixed by arbitration, as follows: Each of the parties hereto shall appoint one arbitrator and the persons so selected shall select a third and the three persons so selected shall examine said buildings and lots and determine the price to be paid by the party of the first part to the parties of the second part therefor, and the award of the said arbitrators so made or the majority of them shall be binding on the parties hereto, and on payment thereof by the party of the first part to the parties of the second part a conveyance of the lots and possession of said buildings, together with all machinery and appurtenances, shall be forthwith delivered to the party of the first part.

13. It is further mutually agreed and understood that as between the parties composing the parties of the second part Jesse Hoyt and Company own three-fourths interest and the said Perry H. Smith and George L. Dunlap together have one-fourth interest in this contract.

In witness whereof the parties to these presents have hereunto put their names and seals the day and year first above written.

THE CHICAGO, MILWAUKEE AND
ST. PAUL RAILWAY COMPANY,
By A. L. MITCHELL, *Pt.*

[Seal Chicago, Milwaukee & St. Paul Railway Company, Incorporated 1865.]

Attest: F. G. RANNEY, *Secretary pro Tem.*

JESSE HOYT. [SEAL.]
ALFRED M. HOYT. [SEAL.]
THEODORE I. HUSTED. [SEAL.]
LEONARD HAZELTINE. [SEAL.]
PERRY H. SMITH. [SEAL.]
GEORGE L. DUNLAP, [SEAL.]
By P. H. SMITH."

Which said indenture was supplemented by a further agreement in writing, under seal, entered into by and between the same parties

on, to wit, the 18th day of February, 1880, in words and figures following, to wit:

"By way of supplement to the agreement dated February eighteenth, 1880, made between the Chicago, Milwaukee & St. Paul Railway Company, party of the first part, and Jesse Hoyt, Alfred M. Hoyt, Theodore I. Husted, and Leonard Hazeltine, doing business under the firm name and style of Jesse Hoyt and Com-
19 pany, of the city of New York, and Perry H. Smith and George L. Dunlap, of the city of Chicago, parties of the second part, it is hereby agreed between the parties thereto and with like legal effect as if the provisions hereof were incorporated in said original agreement as follows, viz:

First. Article one of said contract is hereby amended by adding at the end of said article the words 'and the party of the first part further agrees to give possession of said lots to the parties of the second part on or before the first day of May, 1880.'

Second. Article six of said contract is hereby amended by adding at the end of said article the words 'excepting the same be occasioned by the willful or wanton negligence of the said party of the first part.'

Third. Article seven of said contract is hereby amended by inserting after the word 'Sundays' the words 'upon special request of the general manager of said party of the first part, and when such request is for Sunday work it shall be made on or before the Saturday previous.'

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By A. L. MITCHELL, *Pt.*

[Seal Chicago, Milwaukee & St. Paul Railway Company, Incorporated 1865.]

20 Attest: F. G. RANNEY, *Secretary pro Tem.*

JESSE HOYT. [SEAL.]
ALFRED M. HOYT. [SEAL.]
THEODORE I. HUSTED. [SEAL.]
LEONARD HAZELTINE. [SEAL.]
PERRY H. SMITH. [SEAL.]
GEORGE L. DUNLAP, [SEAL.]
By P. H. SMITH."

Which said indenture and supplement thereto aforesaid, according to the tenor and effect and true intent and meaning thereof, have ever since been and still are in full force and effect.

And the said plaintiffs further aver that they in all ways have kept and performed all the covenants of said indenture and said amendment thereto by them to be kept and performed according to the true meaning and intent thereof and fulfilled each and every of the obligations resting upon them thereunder, and that on, to wit, the first day of May they, the plaintiffs, entered into possession of said lots three (3), four (4), and five (5) of block K of the original town of Chicago and ever since have been in possession thereof, rendering unto the said defendant the rentals stipulated in said in-

denture at the times therein mentioned, and paid all taxes and assessments levied thereon from thence hitherto.

21 The said plaintiffs also aver that during the year 1880 they erected, built, and constructed upon said lots a grain elevator of the capacity of seven hundred thousand bushels, and completed the same ready for business as required by the terms of said indenture, and that said elevator, as constructed by them, was a first-class elevator, and that it had the foundations, machinery, and other appliances and conveniences and modern improvements in said agreement and lease called for, and was constructed to the satisfaction of the defendant.

The said plaintiffs aver that from the time when as aforesaid the said grain elevator was completed ready for business they furnished therein, and in the elevator mentioned in said indenture as then standing on lots one (1) and two (2) of said block, and at all times were willing and ready to furnish grain storage to the amount agreed by them to be so furnished in said two elevators—that is to say, to the amount of one million bushels.

1st breach. But the plaintiffs aver that notwithstanding the covenants of said indenture to be kept and performed by said defendant in this behalf the amount of grain received from said defendant for storage during the year 1886 in the said elevators, allowing to said defendant the full storage capacity of one million

22 bushels stipulated for in said indenture of lease and agreement, was less than the five million bushels covenanted as aforesaid by the defendant to be received therein during said year 1886 by one million seven hundred and forty thousand one hundred and ninety-four (1,740,194) bushels; by reason whereof the said defendant, according to the terms and provisions of the said indenture and its covenant in such case therein provided, became and was bound to pay to said plaintiffs on account of said deficiency of 1,740,194 bushels the sum of seventeen thousand four hundred and one dollars and ninety-four cents ($17,401.94) at the close of said year 1886.

2nd breach. The plaintiffs further aver that the amount of grain received from said defendant for storage during the year 1887 in said two elevators, allowing to said defendant the full storage capacity of one million bushels stipulated for in said indenture, was less than the five million bushels covenanted by the defendant to be received therein during said year 1887 by two million forty-two thousand four hundred and eight (2,042,408) bushels, whereby the said defendant became and was liable to pay to said plaintiffs by virtue of its covenant in such case provided in said indenture at the close of said year 1887 and for the deficiency of said year last aforesaid the sum of twenty thousand four hundred and

23 twenty-four dollars and eight cents ($20,424.08).

3rd breach. The said plaintiffs further aver that the total amount of grain received in the elevators mentioned in said indenture during the years 1886 and 1887 did not equal the ten million bushels or five million bushels upon an average for each of said years covenanted by the defendant in said indenture to be

therein received during those years, but, on the contrary, the said plaintiffs aver that the total amount of grain received in said elevators during said two years, allowing to the defendants the full storage capacity in said elevators of one million bushels stipulated for in said indenture, was less than the ten million bushels promised to be therein received by the defendant as aforesaid during said years 1886 and 1887 by three million seven hundred and eighty-two thousand six hundred and two (3,782,602) bushels, and the plaintiffs aver that on account of said deficiency between the amount of grain promised by the defendant to be received in said elevators and the amount actually received therein during said years the said defendant became and was liable to pay to the plaintiffs, according to the terms and provisions of said indenture of lease and agreement and its further covenant in such case therein provided, the sum of one cent per bushel upon the total number of bushels constituting the deficiency of said years 1886 and
24 & 25 1887, whereby and by reason whereof the said defendant, by virtue of its covenant aforesaid, became liable to pay to said plaintiffs thirty-seven thousand eight hundred and twenty-six dollas and two cents ($37,826.02) at the times and in the manner in said indenture provided.

4th breach. And the plaintiffs further aver that heretofore, to wit, on the first day of April, A. D. 1886, the said defendant required additional storage, exceeding the one million bushels and in excess of the storage that could be furnished to it by the said plaintiffs in the said elevators in said indenture of lease and agreement mentioned, but notwithstanding such requirement on the part of the said defendant it did not give to said plaintiffs the option of furnishing said additional storage upon the terms provided in said indenture, but in violation of its covenant in that behalf and without giving to said plaintiffs such option of furnishing additional storage afterwards, to wit, on the 1st day of March, A. D. 1887, leased and rented to certain persons, to wit, certain persons composing the firm of P. D. Armour & Co., for a term of years certain lots and parcels of land situated in the city of Chicago, in the county of Cook aforesaid, to wit, in the Chicago Land Company's subdivision of blocks
26 36, 37, 46, 47, 48, 55, 56, 62, 63, 70, 71, 74, and 84, together with lot 1 in block 50 of Elston addition to Chicago, upon the understanding and agreement that the said persons so associated under said firm name of P. D. Armour & Co. should at once build and erect thereon another elevator for the receiving and storing of grain brought by said defendant to said city of Chicago.

And the said parties so associated as aforesaid, in pursuance of said understanding and agreement, afterwards proceeded to and did build upon the lots so rented and leased to them by said defendant a large grain elevator for the storage of grain brought to the said city of Chicago by said defendant, of great capacity, to wit, of the capacity of two million bushels, and the same has for a long time, to wit, for the period of six months last past, been and still is in operation and use for the receiving and storing of grain brought to the said city of Chicago by said defendant which should have been

received and stored by said plaintiffs and which but for the disregard and breach of its covenant aforesaid by said defendant would have been received and stored by the said plaintiffs; and the said plaintiffs further aver that they were at all times ready, able, and willing to furnish additional storage room for the said defendant, and would have done so had the option been given to them as in said indenture of lease and agreement was provided, and that by reason of the breach of its covenants in that behalf by the said de-
27 fendant the said plaintiffs have sustained great loss and damage, amounting to a large sum, to wit, the sum of fifty thousand dollars ($50,000).

5th breach. And the plaintiffs further aver that the said defendant heretofore, to wit, on the first day of April, A. D. 1886, notified them, the plaintiffs, in writing, that the defendant required additional storage for grain brought by it to the city of Chicago aforesaid exceeding the storage capacity of one million bushels in said indenture provided in the two elevators therein mentioned.

Yet, nevertheless, the plaintiffs aver that the said defendant did not keep the covenants by it made in said indenture in that behalf and give to the plaintiffs the option and furnish to them the proper grounds for providing the additional storage above mentioned for the said defendant's grain upon the terms named in said indenture; but, on the contrary thereof and in violation of its said covenant, the defendant furnished grounds situated in said city of Chicago to persons other than the plaintiffs for building thereon an elevator in which to store grain brought to said city by the defendant in excess of the one million bushels which the plaintiffs in said indenture agreed to receive for the said defendant in the two elevators therein specified, and the plaintiffs aver that upon the said grounds so furnished by the defendant said other persons built and erected
28 a large grain elevator, to wit, an elevator of a storage capacity of two million bushels, and that for a long time past, to wit, during the period of six months last past, said defendant has been storing grain brought by it to the city of Chicago aforesaid in the grain elevator erected as aforesaid by said persons other than the plaintiffs upon the grounds hereinbefore stated to have been by the defendant furnished to them for such purpose; and the plaintiffs aver that the defendant, by its said breach of said covenants and by furnishing to said other persons grounds for building a grain elevator as mentioned and by storing in said grain elevator the grain brought by it to said city of Chicago as aforesaid, has put the plaintiffs to large loss and damage and prevented the plaintiffs from enjoying the valuable right secured to them by the said defendant's covenant to give to the plaintiffs the option to furnish additional storage in excess of one million bushels for its grain brought to the city of Chicago and deprived the plaintiffs of the right and option to build and erect an elevator for the purpose of providing such additional storage; and the plaintiffs aver that the loss and damage sustained by them in this behalf amounts to a large sum, to wit, the sum of fifty thousand dollars ($50,000).

And so the plaintiffs aver that the defendant has not kept it

covenants aforesaid, but has broken the same, and to keep the same with the said plaintiffs the said defendant hath hitherto
29 wholly refused and still doth refuse, to the damage of the said plaintiffs on account of said several breaches of covenant by the defendant of one hundred thousand dollars ($100,000), and therefore they bring their suit, &c.

And also for that whereas heretofore, to wit, on the 18th day of February, A. D. 1880, at, to wit, the place aforesaid, the said plaintiffs Jesse Hoyt and Perry H. Smith, then living, but now deceased, as parties of the second part, entered into a certain other indenture of lease and agreement with the defendant wherein and whereby the said defendant (1st) demised for the period of ten (10) years from the first day of January, A. D. 1881, to the said plaintiffs and said Jesse Hoyt and Perry H. Smith lots three (3), four (4), and five (5) of block K of the original town of Chicago, at an annual rental of three thousand eight hundred and fifty dollars, to be paid quarterly on the first day of January, April, July, and October of each year, together with all taxes and assessments that might be levied upon said premises during the term of said lease.

And the plaintiffs aver that it was provided in said indenture (2nd) that they and said Jesse Hoyt and Perry H. Smith should erect and build on the said lots a grain elevator of the capacity of 700,000 bushels or more during the year 1880, and complete the same, ready for business, with all reasonable dispatch, said elevator to be constructed in the usual manner of grain elevators in the city of Chicago, and in all respects to be a first-class elevator, with
30 suitable and proper foundations and machinery, with proper bins for storing different kinds of grain and different grades, and with all the modern improvements and appurtenances of a first-class elevator for the transaction of the business of receiving, storing, and discharging grains, and to be constructed to the satisfaction of the defendant in these respects.

That said defendant agreed therein (3rd) to lay all necessary tracks adjacent to said elevator to connect its railway therewith for the purpose of delivering grain in cars thereto, and keep the same in repair during the term of the lease, and to deliver on said tracks in cars at said elevator to the said parties of the second part, the plaintiffs, all the grain that might be brought by its railway consigned to parties in the city of Chicago, so far as the defendant could control the same, for handling and storage in said elevator.

That said parties of the second part agreed (4th) to receive, handle, and store said grain as delivered in the usual manner of handling grain in the city of Chicago to the extent of the capacity of said elevator so to be constructed, and, in addition, agreed that they would use for the same purpose, so far as their other engagements would allow, the elevator there standing on lots one (1) and two (2) of said block, and that the defendant should at all times be entitled to storage for its grain to the extent of at least one million (1,000,000) bushels.

31 That the said parties of the second part, with the consent of the defendant, might receive grain for storage from other

parties and from river and canal craft; but in case such grain was so received *so* as to reduce the capacity of the parties of the second part to accommodate the defendant to the extent of one million bushels in said elevators the said parties of the second part agreed to furnish storage in other elevators to the defendant to the extent of such reduction of their capacity without expense to the defendant for switching or otherwise.

That it was in said indenture agreed between said parties (5th) that said parties of the second part might charge for said storage and handling a rate not exceeding one and one-fourth cents per bushel for first storage, provided such rate was allowed by law and did not exceed the customary rate charged by the elevators transacting the business of competing roads in the city of Chicago, to wit, the Chicago and Northwestern railway, the Illinois Central railway, the Chicago, Rock Island and Pacific railway, and the Chicago, Burlington and Quincy railway, and that the charge to be made for first and other storage by the parties of the second part should at all times during the continuance of the lease be the same as the *same as the* storage regularly charged in the city of Chicago by the elevators above mentioned, not exceeding, however, the rate of one and one-fourth cents per bushel for first storage; but in
32 case first storage (for ten days) should be reduced below one cent per bushel for any cause and said parties of the second part should in writing request the same to be raised to one cent per bushel the defendant should within ten days after receiving such request elect either to pay one cent per bushel for first storage or to terminate the said contract and take and pay for said elevators and real estate, as subsequently in said agreement provided.

That it was further agreed (6th) that in case of the destruction of the elevators then standing on said lots or of the elevators to be built by said parties of the second part by fire or otherwise the same should be rebuilt by the parties of the second part with all reasonable dispatch, and also that said parties of the second part should save the defendant free and harmless from all loss or damage by fire to said elevators or contents during the continuance of the lease from any cause whatever.

That it was therein agreed (7th) that in case the law requiring weighers to be appointed by the State should be repealed, and such weighers appointed by the parties of the second part, and complaint should then be made to the defendant as to the manner or correctness of weighing grain, or if the defendant should be dissatisfied with the action of the parties of the second part in that respect, that the defendant might appoint weighers to attend to the weigh-
33 ing of all grains into and out of said elevators, and that the said parties of the second part would pay the parties so appointed for their services and pay all expense of said weighing.

And that said parties of the second part would at all times keep a force at said elevators sufficient to transact all business that might be offered by said defendant, and that cars of grain would be received and unloaded, when the defendant required it, in the night time or on Sundays, and that said business should be dispatched

with equal and as great facility in that respect as at any of the elevators in the city of Chicago above mentioned, so as not to delay the cars of the defendant unreasonably or unnecessarily.

And the said plaintiffs aver that the said defendant in and by said indenture covenanted (8th) that the total amount of grain received at said elevators should be at least five million bushels on an average for each year during the term of the lease, and in case it should fall short of that amount the defendant agreed to pay to the parties of the second part, the plaintiffs, one cent per bushel on the amount of such deficiency—

Settlements to be made at the close of each year that the total grain received during so much of the term of said lease as should then have elapsed did not amount to an average of five million bushels; for each year the defendant should pay to the parties
34 of the second part, the plaintiffs, one cent per bushel for the amount of such deficiency, but in case it should afterwards appear that the total amount received up to that time equaled or exceeded the average amount of five million bushels per annum the amount so paid to the parties of the second part, the plaintiffs, should be refunded or so much thereof as the receipts of the year should have exceeded five million bushels, so that the whole amount paid on account of deficiency should be refunded should the total receipts for the entire term equal or exceed fifty million bushels in all or an average of five million bushels for each year.

That (9th) the said parties of the second part agreed, in addition to the rent above named, to pay all taxes and assessments that might be levied upon said premises during the term demised to keep said buildings and the docks in front thereof in proper repair and condition for the transaction of business at said elevators, and that the business of the defendant should be at all times transacted with expedition and with as much facility as similar business was transacted at any of the elevators named.

And the plaintiffs aver that it was further covenanted by and between said defendant and them as parties of the second part that (10th) all line cars for shipments of grain out from the elevators were to have free access over the defendant's track on as favor-
35 able terms as were granted them at the other elevators mentioned; and, further, in case defendant should require additional storage exceeding said one million bushels or the amount that could be furnished by said parties of the second part, the plaintiffs, at both the elevators on the lots described, to wit, the elevator then standing on lots one and two of block K and the one to be built, that the defendant should give to the parties of the second part, the plaintiffs, the option of furnishing said storage on the terms in said contract prescribed.

That it was further mutually covenanted that said business of handling and storing said grain should be done in the usual manner of transacting such business in the city of Chicago in all respects and to the satisfaction of the defendant's superintendent.

But in case the defendant should in writing notify the parties of the second part that the defendant required additional storage as

before provided it covenanted that it then should furnish the proper grounds therefor at an annual rental of seven per cent. per annum or an amount equal to the cost thereof, together with taxes and assessments; and if the parties of the second part should decline or fail to furnish said additional storage within a reasonable time the defendant might elect to terminate the indenture on account of such failure, and in that event the defendant should take the said lots one (1) and two (2) of block K and the elevator then
36 standing thereon, together with the elevator to be constructed on the lots demised in the manner and on the terms thereinafter provided; and on receiving payment as thereinafter provided the second party agreed to make a conveyance of said lots one (1) and two (2) of block K and of the elevator standing thereon, and also the elevator to be constructed on lots three (3), four (4), and five (5) of said block K, free and clear of all encumbrances to the defendant and surrender possession thereof to it.

That in said indenture it was agreed (11th) that so much of lots three (3), four (4), and five (5) of said block K as was not required for the uses, purposes, and operation of the elevator to be constructed by the parties of the second part, the plaintiffs, might be used by the defendant during the continuance of the lease and agreement for railroad tracks and other purposes connected with its business.

And that it was also agreed (12th) that at the expiration or sooner termination of said lease the defendant, unless by mutual consent said lease should be renewed for an additional term, should purchase the elevator then standing on lots one (1) and two (2), together with said lots, and also the elevator to be constructed on lots three (3), four (4), and five (5), and also any additional elevator that might be built under the terms of said agreement, at their then value in cash, and if the parties to the agreement were unable to agree
37 upon the price to be paid therefor the same should be fixed by arbitration, each of the parties to appoint an arbitrator, they to select a third, and said three so appointed should examine said building- and lots and determine the price to be paid by the defendant to the parties of the second part, the plaintiffs, therefor, the award of the said arbitrators so made, or the majority of them, to be binding on the parties to said indenture, and on payment thereof by the defendant to the parties of the second part a conveyance of the lots and possession of said buildings, together with all machinery and appurtenances, should be forthwith delivered to the defendant.

And it was further agreed and understood (13th) that as between the parties composing the parties of the second part Jesse Hoyt and Company owned three-fourths interest and said Perry H. Smith and George L. Dunlap together had one-fourth interest in said indenture.

The plaintiffs further aver that by way of supplement to the above indenture the same parties after the date thereof and on, to wit, the 18th day of February, A. D. 1880, entered into an agree-

ment in writing, under seal, wherein and whereby it was provided that—

First. Article one of said contract be amended by adding at the end thereof that the defendant agreed to give possession of
38 said lots to the parties of the second part on or before the 1st day of May, 1880.

Second. That article six of said contract be amended by adding at the end thereof the words "excepting the same be occasioned by the wilful or wanton negligence of the said party of the first part."

Third. That article seven of said contract be amended by inserting after the word "Sundays" the words "upon special request of the general manager of said party of the 'first part,' and when such request is for Sunday work it 'shall be made on or before the Saturday previous.'"

And the plaintiffs aver that the indenture aforesaid and the said supplement thereto, from the dates thereof, have been and still are, according to ther true meaning and intent, in full force and effect.

And the plaintiffs further aver that they and said Jesse Hoyt and Perry H. Smith in their lifetime, from the dates of said indenture and the amendment thereto, have in all ways performed and fulfilled all the covenants, undertakings, and promises in said indenture contained by them to be performed and kept, and carried out all the obligations resting upon them by reason thereof according to the true sense and meaning of said indenture and the amendment thereto, and that they entered into possession of said lots three
39 (3), four (4), and five (5), demised as aforesaid to them by the defendant, on, to wit, the first day of May, 1880, and ever since then have remained in possession of them, paying the rentals, of the amounts and at the time specified therefor in said indenture, to the defendant, and also all taxes and assessments on said lots as required therein.

And the plaintiffs also aver that they erected, built, and constructed upon said demised lots during the year 1880 a grain elevator of the capacity of seven hundred thousand bushels and had the same completed, ready for business, as required by the said agreement and at the time required, and that they constructed the same as a first-class elevator, with the foundations, machinery, appliances, appurtenances, and modern improvements mentioned in said indenture, and that said elevator was constructed by them to the satisfaction of said defendant.

And the plaintiffs aver that from the date of the completion of said elevator, as aforesaid, ready for business they furnished to the defendant therein, and in other elevator mentioned in said indenture as then standing upon lots one (1) and two (2) of said block K, storage room for grain to the amount by them, the plaintiffs, required to be furnished under said agreement—that is to say, to the amount of one million bushels—and at all times have been ready and willing to furnish the storage for grain to the defendant
40 that was so as aforesaid required to be furnished to it by them in said two elevators.

1st breach. But the said plaintiffs aver that notwithstanding the

said defendant in said indenture of lease and agreement covenanted that the total amount of grain received at said elevators should be at least five million bushels on an average for each year during the term of said lease, yet the amount of grain received in said elevators during the year 1886, allowing to the defendant the full storage capacity in said elevators of one million bushels agreed upon in said indenture, was less than the five million bushels covenanted by the defendant to be received therein during said year by one million seven hundred and forty thousand one hundred and ninety-four (1,740,194) bushels, by reason of which the defendant, according to the terms of the indenture aforesaid, became and was bound at the close of said year 1886 to pay to the plaintiffs for said deficiency for the year 1886 the sum of seventeen thousand four hundred and one dollars and ninety-four cents ($17,401.94).

2nd breach. The plaintiffs also aver that, contrary to the defendant's covenant in that behalf aforesaid, the amount of grain received in said elevators during the year 1887, allowing to the defendant the one million bushels storage capacity provided in said in-
41 denture, was less than the five million bushels of grain covenanted by the defendant to be received in said elevators during said year by two million forty-two thousand four hundred and eight bushes, whereby the defendant, as provided in said indenture of lease and agreement, became and was liable to pay to said plaintiffs at the close of the year 1887, on account of the deficiency aforesaid of said year, the sum of twenty thousand four hundred and twenty-four dollars and eight cents ($20,424.08).

3rd breach. And the plaintiffs further aver that the total amount of grain received in the elevators mentioned in said indenture of lease and agreement during the year- 1886 and 1887 did not equal the ten million bushels, or five million bushels upon an average for each of said years, covenanted by said defendant in said indenture to be therein received during those years; but, on the contrary, the plaintiffs aver that the total amount of grain received in said elevators during said two years, allowing to the defendant the full storage capacity in said elevators of one million bushels stipulated for in the indenture aforesaid, was less than the ten million bushels agreed to be therein received by the defendant as aforesaid during said years 1886 and 1887 by three million seven hundred and eighty-two thousand six hundred and two ($3,782,602) bushels; and the plaintiffs aver that on account of the said defi-
42 ciency between the amount of grain agreed by the defendant to be received in said elevators and the amount actually received therein during the said two years the said defendant became and was liable to pay to the plaintiffs according to the terms and provisions of said indenture of lease and agreement; and it further covenants in such case therein provided the sum of one cent per bushel upon the total number of bushels of grain constituting the deficiency of said years 1886 and 1887, whereby and by reason whereof the said defendant, by virtue of its covenants aforesaid, became liable to pay to said plaintiffs thirty-seven thousand eight

hundred and twenty-six dollars and two cents ($37,826.02) at the times and in the manner in said indenture provided.

4th breach. And the said plaintiffs further aver that heretofore, to wit, on the first day of April, A. D. 1886, the said defendant required additional storage exceeding the capacity of one million bushels and in excess of the storage that could be furnished to it by the said plaintiffs in the said elevators in said indenture of lease and agreement mentioned, but notwithstanding such requirement on the part of the said defendant it did not give to the said plaintiffs the option of furnishing such additional storage upon the
43 terms named in said indenture, but, violating its covenants herein and without giving to the plaintiffs the said option of furnishing additional storage, afterwards, to wit, on the first day of March, A. D. 1887, the defendant leased and rented to certain persons composing the firm of P. D. Armour & Co., for a term of years, certain lots and parcels of land situated in the city of Chicago, in the county of Cook aforesaid, to wit, in the Chicago Land Company's resubdivision of blocks 36, 37, 46, 47, 48, 55, 56, 62, 63, 70, 71, 74, and 84, together with lot 1, in block 50, of Elston addition to Chicago, upon the understanding and agreement that the said persons so associated under said firm name of P. D. Armour & Co. should at once build and erect thereon another elevator for the receiving and storing of grain brought by said defendant to said city of Chicago.

And the said parties so associated as aforesaid, in pursuance of said understanding and agreement, afterwards proceeded to and did build upon the lots so rented and leased to them by said defendant a large grain elevator for the storage of grain brought to the city of Chicago by said defendant, of great capacity, to wit, of the capacity of two million bushels, and the same has for a long time, to wit, for the period of six months last past, been and still is in opera-
44 tion and use for the receiving and storing of grain brought to the city of Chicago aforesaid by said defendant which should have been received and stored by said plaintiff- and which but for the disregard and breach of its covenants aforesaid by said defendant would have been received and stored by the said plaintiffs.

And the said plaintiffs further aver that they were at all times ready, able, and willing to furnish additional storage room for the said defendant and would have done so had the option been given them as in said indenture of lease and agreement was provided.

And that by reason of the breach of its covenants in that behalf by the said defendant the said plaintiffs have sustained great loss and damage, amounting to a large sum, to wit, the sum of fifty thousand dollars ($50,000).

5th breach. And the said plaintiffs further aver that the said defendant heretofore, to wit, on the first of April, A. D. 1886, notified them, the plaintiffs, in writing that the defendant required additional storage in excess of the one million bushel storage capacity provided for in said indenture in the two elevators therein mentioned, and that said additional storage was needed for the purpose of receiving and storing grain brought by the defendant to the city of Chicago

aforesaid over its railroad, yet, nevertheless, the said defend-
45 ant did not, according to the covenants of said indenture by it made, give to the plaintiffs the option to provide said additional storage and furnish to the plaintiffs the proper grounds for building and providing an elevator thereon to be used by the plaintiffs in receiving such grain in excess of said one million bushels as was required to be stored by the defendant; but the plaintiffs aver that, instead of furnishing to them such grounds upon the terms mentioned in said indenture, as it therein as aforesaid agreed to do, the said defendant furnished grounds for that purpose to certain persons other than the said plaintiffs in the city of Chicago aforesaid, and that upon said grounds so furnished by the defendant to such other persons the said persons built and erected a grain elevator of a large storage capacity, to wit, of the capacity of two million bushels, and for a long time past, to wit, during the period of six months last past, said defendant has been storing grain brought by it to said city of Chicago in excess of the storage capacity of the two elevators mentioned in said indenture in the grain elevator built and erected as aforesaid by said persons upon said grounds for that purpose furnished by the defendant to them.

And the plaintiffs aver that by reason of the said breach of its covenants by the defendant and its storage of grain in said elevator built as aforesaid by said persons other than the plaintiffs the plaintiffs have been deprived of their right- secured to them
46 by said indenture to supply storage to the defendant for its grain in said city of Chicago in addition to the amount of one million bushels, specified to be the amount to be received for storage in the two elevators aforesaid mentioned in said indenture, and that on account of said deprivation of their aforesaid rights so secured to them and of the defendant's said breach of covenant the plaintiffs have sustained loss and damage in a large sum, to wit, the sum of fifty thousand dollars ($50,000).

And the plaintiffs therefore aver that the defendant has not kept its covenants aforesaid, but has broken the same, and to keep the same with the said plaintiff- the said defendant hath hitherto wholly refused and still doth refuse, to the damage of the said plaintiffs, on account of said several breaches of covenant by the defendant, of one hundred thousand dollars ($100,000), and they therefore bring their suit, &c.

JNO. N. JEWETT &
JEWETT BROS.,
*Attorneys for Pl'ffs.*

*Copy of Instrument Sued On.*

A copy of the instrument sued upon is set out in full in the first count of the foregoing declaration, to which reference is made.

47 And afterwards, to wit, on the 10th day of July, A. D. 1888, there were filed in the office of the clerk of said court a certain petition and bond, which are in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
*Cook County,* }

In the Superior Court.

ALFRED M. HOYT, THEODORE I. HUSTED, LEONARD HAZELTINE, and George Dunlap, Survivors of Jesse Hoyt and Perry H. Smith, Deceased, for Use of Munger, Wheeler & Co., Plaintiffs,
*vs.*
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

The petition of The Chicago, Milwaukee and St. Paul Railway Company, defendants in above-entitled suit, shows to the court that the above suit was begun on or about the 28th day of May, A. D. 1888, in the superior court of Cook county, State of Illinois, and that the declaration in said cause was filed on the 29th day of June, A. D. 1888, and that by the rules of the courts and the laws of the State of Illinois said defendant is not yet required to plead or answer to said declaration.

That at the time the said suit was begun and at the present
48 time the defendant was and is a citizen and resident of the State of Wisconsin; that the plaintiffs were not nor was any one of them at the time of commencement of said suit and are not now citizens or residents of the State of Wisconsin, but that said Alfred M. Hoyt, Theodore I. Husted, and Leonard Hazeltine were at commencement of said suit and are now citizens and residents of the State of New York; that said George L. Dunlap was at commencement of said suit and is now a resident and citizen of the State of Illinois; that Jesse Hoyt and Perry H. Smith, of whom said plaintiffs are the survivors, were in their lifetime citizens and residents of the State of New York; that said Munger, Wheeler & Company were at commencement of said suit and are now citizens and residents of the State of Illinois.

That the matter in dispute in said suit and for which said suit is brought exceeds the sum of two thousand dollars, exclusive of interest and costs, said suit being brought for breach of contract, with damages alleged and claimed of one hundred thousand dollars.

And the defendant herewith files a bond, with good and sufficient sureties, for *his* entering in the circuit court of the United States for the northern district of Illinois on the first day of its usual session a copy of the record in said suit, and for paying *on* costs that may be awarded by said circuit court *of* said court then
49 held that *same* suit was wrongfully or improperly removed thereto, as provided by the statute of the United States.

Wherefore the defendant prays this honorable court that said bond be approved and suit be removed into the circuit court of the United States for the northern district of Illinois, and that this court *proved* no further in the premises.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By E. W. WALKER, *Its Solicitor.*

STATE OF ILLINOIS, } ss:
*Cook County,* }

Edwin Walker, being duly sworn, says that he is the solicitor for the defendant in the within-named cause; that he is one of the officers of said company and duly authorized to make this oath on its behalf; that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the same is true of his own knowledge.

EDWIN WALKER.

Sworn to before me this 10th day of July, A. D. 1880.

[SEAL.] EUGENE F. RYAN,
*Notary Public.*

Know all men by these presents that we, The Chicago, Milwaukee & St. Paul Railway Company, of the State of Wisconsin, as
50 principal, and Edwin Walker, of Chicago, in the county of Cook and State of Illinois, as surety, are held and firmly bound unto Alfred M. Hoyt, Theodore I. Husted, Leonard Hazeltine, and George L. Dunlap in the penal sum of one thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves and our heirs, executors, or administrators, jointly and severally and firmly, by these presents.

Whereas the Chicago, Milwaukee & St. Paul Railway Company, principal above named, has petitioned the superior court of Cook county, in the State of Illinois, for the removal of a certain suit therein pending, wherein Alfred M. Hoyt, Theodore I. Husted, Leonard Hazeltine, and George Dunlap are plaintiffs and the said Chicago, Milwaukee & St. Paul Railway Company is defendant, into the circuit court of the United States for the northern district of State of Illinois:

Now, therefore, the condition of this obligation is such that if the above-bounden Chicago, Milwaukee & St. Paul Railway Company shall enter and file or caused to be entered and filed in the next circuit court of the United States in and for the northern district of Illinois on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the said superior court of Cook
51 county and State of Illinois, in which said parties are plaintiffs and said company is defendant, and shall pay all costs that may be awarded by said circuit court, if said circuit court shall hold that said cause was wrongfully or improperly removed thereto, and shall also appear in said circuit court and enter special bail in such cause, if special bail was originally required therein, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon removal of such suit from said State court into the United States court, then this obligation to be void; otherwise of force.

Witness our hands and seals this 5th day of July, 1888.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.,
By P. M. MEYERS, *Sec'y.* [SEAL.]
EDWIN WALKER. [SEAL.]

UNITED STATES OF AMERICA, }
*Eastern District of Wisconsin, Milwaukee County,* } *ss:*

I hereby certify that on this 5th day of July, 1888, before me personally came and appeared P. M. Meyers, secretary of said company, the principal in the within bond, personally known to me and known to me to be the person in and who executed
52 the foregoing bond in behalf of said company, as principal, and that he thereupon acknowledged that he executed the same in the manner and form and for the purpose therein mentioned.

H. H. FIELD,
*Notary Public, Milwaukee County, Wisconsin.*

And afterwards, to wit, on the 10th day of July, A. D. 1888, the same being one of the days of the July term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

| | | |
|---|---|---|
| ALFRED M. HOYT, THEODORE I. HUSTED, LEONARD Hazeltine, & George L. Dunlap, Survivors of Jesse Hoyt & Perry H. Smith, Deceased, for the Use of Munger, Wheeler & Co., *vs.* THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY. | 116,347. | Covenant. |

On motion of defendant's attorney, it is ordered that this cause be, and is hereby, transferred to the United States circuit court in and for the northern district of Illinois;

And that the clerk of this court do forthwith transmit to said United States circuit court a full and complete transcript of all papers and pleadings filed in said cause, together with all orders made and entered of record herein.

53 STATE OF ILLINOIS, }
*County of Cook,* } *ss:*

I, Patrick McGrath, clerk of the superior court of Cook county, in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court, on the law side thereof, wherein Alfred M. Hoyt *et al.* were plaintiffs and The Chicago, Milwaukee and St. Paul Railway Co. was defendant.

In witness wereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Chicago, this 30th day of July, A. D. 1888.

P. McGRATH, *Clerk.*

Trans. fees, $15.00, & paid by def't's att'y.

P. McGRATH, *Clerk.*

(Endorsed:) Filed Sept. 8, 1888. Wm. H. Bradley, clerk.

54 Afterwards, to wit, on the twenty-seventh day of September, 1888, came the defendant, by its attorney, and filed in said clerk's office its demurrer to the declaration in said entitled cause; which said demurrer is in the words and figures following, to wit:

*Demurrer.*

In the United States Court for the Northern District of Illinois.

ALFRED M. HOYT *et al.*
*vs.*
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

And the defendant, by E. Walker, its attorney, comes and defends, etc., when, etc., and says that the said declaration and each count thereof and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiffs to maintain their aforesaid action, and that it, the defendant, is not bound by law to answer the same, and this it is ready to verify; wherefore, for want of a sufficient declaration in this behalf, the defendant prays judgment and that the plaintiffs may be barred from maintaining their aforesaid action, etc.

The defendant shows to the court here the following causes of demurrer to said declaration and each count thereof—that is to say, that the breaches of covenant charged in each of said counts,
55 in manner and form as the same are above set forth, are not nor are either of them sufficient in law for the plaintiffs to maintain their aforesaid action or for the recovery of damages alleged in said breaches or either of them, and also that the said declaration and each count thereof is in other respects uncertain, informal, and insufficient, etc.

E. WALKER,
*Att'y for Def't.*

(Endorsed:) Filed Sept. 27, 1888. Wm. H. Bradley, clerk.

56 Afterwards, to wit, on the third day of November, in the adjourned October term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Order.*

ALFRED M. HOYT *et al.*
*vs.*
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the defendant to the declaration filed herein, and, after hearing the arguments of the counsel, the court takes the same under advisement.

57 Afterward, to wit, on the nineteenth day of November, 1888, there was filed in said clerk's office the opinion of Judge Blodgett in said entitled cause; which said opinion is in the words and figures following, to wit:

*Opinion.*

ALFRED M. HOYT *et al.*
*vs.*
THE C., M. & ST. P. RAILWAY CO.

BLODGETT, *J.:*

In this case a demurrer is interposed to the declaration. The suit is upon a contract made between the parties in February, 1880, whereby the defendant leased to plaintiffs for a term of ten years from the 1st of January, 1881, certain lots in the city of Chicago at a stipulated rental per annum, payable quarterly, and the plaintiffs agreed to erect on said lots during the year 1880 a first-class grain elevator with a capacity of 700,000 bushels, with suitable machinery and bins and all the modern improvements for storing and discharging grain to the satisfaction of the railway company, and also agreed that another elevator owned by plaintiffs, of about 300,000 bushels capacity, then standing on lots adjoining those so leased, should be operated in connection with the new elevator, so as to furnish storage for at least one million bushels of grain at a time,

58 and the railway company agreed to deliver on the tracks at said elevator all the grain brought by it and consigned to parties in Chicago, as far as the railway company could control such grain for handling and storage. Plaintiffs also agreed that they would at all times keep a force at said elevators sufficient to transact all business that might be offered by the railway company with dispatch equal to that of any other elevators in Chicago, and the railway company, in consideration of these provisions, agreed that the total amount of the grain received at such elevators should be at least five million bushels for each year during the term of said lease, and in case it should fall short of that amount the railway company agreed to pay to plaintiffs one cent per bushel on the amount of such deficiency; settlements and payments to be made at the close of each year. There was also a provision that any excess of grain received in any year after a payment to plaintiffs on

account of such deficiency should entitle the railway company to a repayment on account of such deficiency to the extent of the deficiency so paid by the railway company if the excess amounted to such deficiency.

It was also agreed by the defendants that if defendants should require storage exceeding said one million bushels or the amount that could be furnished by plaintiffs in their two elevators, defendant should give plaintiffs the option to furnish the same on
59 the terms provided by the contract as to storage in the plaintiffs' two elevators and should furnish the proper ground for the additional storage facilities required at a rental named in the contract, and in case the plaintiffs should fail to furnish such additional storage within a reasonable time the defendant should have the right to terminate the contract and take the two elevators at their cash value, such value to be fixed by arbitrators if the parties cannot agree as to the sale.

Certain amendments and additions to the original contract were afterwards made, but I treat them all as one contract, for the purpose of the questions now raised.

The declaration, then, avers that plaintiffs have performed all the terms and covenants contained in the contract to be by them kept and performed; that they built the elevator called for by the contract during the year 1880 on the lots so leased to them, of the capacity and construction and in the manner called for by the contracts and to the satisfaction of the defendant, and aver that they have at all times since the completion of said elevator been willing and ready to furnish to the defendant grain storage in their said two elevators to the amount called for by the contract, and then charge the defendant with the following breaches of the contract:

1. That there was in the year 1886 a deficiency of 1,740,194 bushels for which defendant was bound to settle and pay
60 plaintiffs at the close of such year at the rate of one cent per bushel, amounting to the sum of $17,401.94, and that the defendant has neglected and refused to so settle and pay for such deficiency.

2. That there was a deficiency in the year 1887 of 2,042,408 bushels on which defendant was bound to pay plaintiffs at the rate of one cent per bushel, amounting to $20,042.08, at the close of such year, but defendant has failed and refused to pay.

3. That there was an accrual of the aggregated deficiencies of the years 1886 and 1887 due to the plaintiffs and failure of defendant to pay the same at the close of such years.

4. That on the 1st of April, 1886, defendant required additional storage and did not give to plaintiffs the option of furnishing the same upon the terms provided in the contract, but, on the contrary, leased and rented to other persons certain parcels of land on which such other persons have erected an elevator of the capacity of two million bushels, to which the defendant has since delivered large quantities of grain which should have been delivered to the plaintiffs for storage, and that the plaintiffs have at all times been able, ready, and willing to furnish all additional storage needed by the de-

fendant, and would have done so had the option been given them, as required by such contract, whereby plaintiffs have sustained damages to the amount of $50,000.

61 5. That the defendant, on the 1st day of April, 1886, notified plaintiffs in writing that it required more storage, but charges that defendant did not give plaintiff- the option to furnish the additional storage, but contracted with other persons to furnish the same, and that such other persons have erected an elevator of two-million-bushel capacity on lots leased to them by the defendant, and that defendant has delivered to said elevator large quantities of grain for storage, which plaintiffs were ready and willing to receive and store and which of right, under said contract, should have been delivered to the plaintiffs for storage.

The second count of the declaration sets out the contract according to its substance instead of giving a complete copy of it, as is done in the first count, and concludes with the same breaches assigned in the first count.

It is urged on the part of the defendant in support of this demurrer that the right of action under the deficiency clause of the contract depends upon the contract being construed as an undertaking on the part of the defendant to deliver, and also an undertaking on the part of defendant, and that the plaintiffs should accept delivery of the quantity of grain to be furnished in each year, and defendant contends that such a contract would be void because defendant

62 can only tender or offer delivery, and would be wholly unable to compel plaintiffs to receive the grain into the elevator or receive it for the plaintiffs, and hence, under this construction, it is impossible to perform the contract.

2. That the deficiency clause is nothing but a wager that so many bushels will be received in store by the plaintiffs in each year; hence void as a wager contract.

3. That as a wager contract the deficiency clause is *ultra vires*.

I do not think these positions are well taken. The declaration shows what seems to me a valid undertaking on the part of the defendant that the defendant will and does, in consideration that plaintiffs will erect and maintain an elevator such as is called for by the contract, guarantee to plaintiff- that each year's business of the elevator shall amount to a certain sum. This is neither a wager contract nor is it *ultra vires*. The obvious purpose of defendant by the contract was to secure ample storage facilities for such grain as it should bring to the city of Chicago, and such an undertaking it certainly seems to me to have been within the powers of the defendant. Read clause eight of sec. 20, chap. 114, Rev. Stat of Ill.

The declaration states the undertaking on the part of the defendant, the performance by plaintiffs of the conditions precedent to be performed by them, and the breach by the defendant of the covenants to make good the deficiency in the receipts for the years

63 1886 and 1887. This is enough to show a *prima facie* right of plaintiffs to recover.

It was urged that the contract requires the plaintiffs to keep an adequate force to receive into the elevator all grain brought

to them by the defendant and that the declaration contains no allegation that such force was so kept by the plaintiffs to receive the grain brought there by the defendant, but the declaration does contain an allegation that plaintiffs were at all times ready and willing to furnish storage to the amount agreed upon, and this allegation is broad enough, as it seems to me, to admit of proof that plaintiffs did keep an adequate force to receive such grain, as plaintiffs could not truly say that they were ready and willing to furnish the storage unless they had sufficient help to receive the grain as it was brought to them in defendant's cars. The plaintiffs are not required to aver the performance of any conditions subsequent for the purpose of showing the right of recovery, as the failure to perform conditions subsequent is a matter of defense to be pleaded by the defendant.

Gould's Pleadings, 164.

I therefore think the declaration sufficient as to the first, second, and third breaches of both counts.

As to the breaches of both counts which allege the violation by the defendant of the agreement to give plaintiffs the option to
64. furnish the additional storage above the one million bushels contracted for, the declaration shows the agreement on the part of the defendant to give the plaintiffs the option to furnish such additional storage, and the fourth breach in each count states that additional storage became necessary, and that the defendant did not give the plaintiffs the option to furnish it. I think this clause of the contract imposed upon the defendant the obligation to give to the plaintiffs the privilege of furnishing this additional storage when it became necessary or desirable for the defendant, and if defendant did not so offer it to the plaintiffs it was, at least, a technical breach of the contract. What damages can be recovered for such breach, when there was nothing done by the plaintiffs, will be a question for further consideration when the case goes to trial.

As to the fifth breach assigned in each count, the allegation is that on April 1, 1886, the additional storage became necessary and the defendant so notified plaintiffs in writing, but did not give plaintiffs the option to furnish such storage.

This notice, as I construe it, was sufficient to make it necessary for plaintiffs to assert their readiness to act in the premises and accept the option. In other words, when plaintiffs received notice that more storage was needed by defendant they should at once or within a reasonable time have notified the defendant that
65 they would exercise the option to which they were entitled under the contract. This they do not show that they did, and my present view of the question is that, after waiting a reasonable time from the receipt of such notice, defendant would have the right to assume that plaintiffs had declined to act upon their option and be at liberty to deal with others in regard to such additional storage.

I therefore think the fifth breach assigned in each count is insufficient. The demurrer is therefore sustained as to the fifth breach in each count and overruled as to the remainder of the declaration.

(Endorsed:) Filed Nov. 19, 1888. Wm. H. Bradley, clerk.

66 On the same day, to wit, on the nineteenth day of November, in the adjourned October term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Order.*

ALFRED M. HOYT *et al.*
*v.*
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Now come the plaintiffs, by their attorney, and the court, having considered and being now fully advised upon the demurrer of the defendant to the declaration filed herein, sustains said demurrer as to the fifth breach in each count of said declaration and overrules it as to the remainder of said declaration, and, on motion of the plaintiffs, by their attorney, leave is given them to amend the fifth breach of the counts of said declaration.

67 Afterward, to wit, on the twenty-sixth day of November, in the adjourned October term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Order.*

ALFRED M. HOYT *et al.*
*vs.*
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Now come the plaintiffs, by J. N. Jewett, Esq., their attorney, and, on his motion, leave is given the plaintiffs to withdraw the fourth and fifth assignments of breaches under the first and second counts of the declaration filed herein.

Afterward, to wit, on the ninth day of January, 1889, came the plaintiffs, by their attorneys, and filed in said clerk's office their similiter and demurrer to the pleas of the defendant in said entitled cause; which said similiter and demurrer are in the words and figures following, to wit:

68 In the Circuit Court of the United States for the Northern District of Illinois.

ALFRED M. HOYT *et als.*, Survivors, &c., for the Use of Munger, Wheeler & Co.,
*vs.*
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

*Similiter.*

And the said plaintiffs, as to the plea of the said defendant by it first above pleaded and whereof it hath put itself upon the country, do the like.

*Demurrer.*

And the said plaintiffs, as to each and every of the said pleas of the said defendant by it, after the first plea above pleaded, say that the same and each and every thereof and the matters therein contained in the manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that the said plaintiffs are not bound by law to answer the same; and this they, the said plaintiffs, are ready to verify.

Wherefore, by reason of the insufficiency of the said pleas and each of them in this behalf, the said plaintiffs pray judgment and their damages sustained on occasion of the said breaches of covenant in the said declaration mentioned to be adjudged to them, &c.

JNO. N. JEWETT &
JEWETT & BROS.,
*Att'ys for Plaintiffs.*

Endorsed: Filed Jan'y 9, 1889. Wm. H. Bradley, clerk.

69 Afterwards, to wit, on the twenty-second day of January, 1889, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

70 In the Circuit Court of the United States for the Northern District of Illinois.

ALFRED M. HOYT *et als.*, Survivors, &c., for the Use of Munger, Wheeler & Co.,
*vs.*
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY. } Covenant.

It is hereby stipulated and agreed by the parties to the above-entitled cause, by their attorneys, respectively, that said cause shall stand for trial upon the single plea of general performance first pleaded by the said defendant and the issue made thereon, with the right reserved to either party to introduce on the trial of said cause, under said issue, all evidence which could be properly introduced under any issue legitimately framed under special pleas applicable to the case, and that upon the filing of this stipulation all further pleas filed herein by the said defendant shall be considered as withdrawn.

Chicago, January 21st, 1889.

JNO. N. JEWETT &
JEWETT BROS.,
*Attorneys for Plaintiff-.*
E. WALKER,
*Attorney for Defendant.*

Endorsed: Filed Jan'y 22, 1889. Wm. H. Bradley, clerk.

Afterward, to wit, on the 30th day of January, 1889, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

71 In the Circuit Court of the United States for the Northern District of Illinois.

ALFRED M. HOYT *et al.*, Survivors, &c., for Use of Munger, Wheeler & Co.,
*vs.*
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

It is hereby stipulated and agreed that the above-entitled cause shall be submitted for trial to the court without the intervention of a jury, a jury in said cause being hereby expressly waived.

Chicago, January 30, 1889.

JNO. N. JEWETT,
*Att'y for Pl'ffs.*
E. WALKER,
*Att'y for Def't.*

Endorsed: Filed Jan'y 30, 1889. Wm. H. Bradley, clerk.

72 On the same day, to wit, on the thirtieth day of January, 1889, in the December term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

*Order.*

ALFRED M. HOYT *et al.*
*vs.*
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Now come the parties, by their attorneys, and upon issue joined by agreement of the parties, as per stipulation filed, they waive the intervention of a jury and for trial put themselves upon the court, and by stipulation filed it is ordered that all the special pleas herein be withdrawn, and after hearing the evidence and the arguments of the counsel the court takes this cause under advisement.

Afterward, to wit, on the first day of October, 1889, there was filed in said clerk's office the special findings of the court and a motion for new trial in said entitled cause; which said special findings and motion for new trial are in the words and figures following, to wit:

73 UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States for the Northern District of Illinois.

ALFRED M. HOYT, THEODORE I. HUSTED, LEONARD HAZELTINE, and G. L. Dunlap, Survivors of Jesse Hoyt and Perry H. Smith, Deceased, for the Use of Munger, Wheeler & Company,
*vs.*
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Be it remembered that heretofore, to wit, on the — day of ——, A. D. 1889, being one of the regular days of said term of said court, before the Honorable Walter Q. Gresham, judge of said court, presiding, this cause came on for hearing under the pleadings heretofore filed herein and under written stipulation of the parties, by their respective counsel, that a jury be waived and that said cause be submitted to the court.

And thereupon, after hearing all the evidence submitted by the respective parties, the defendant, by its counsel, presented the following propositions and prayed the court to rule as a matter of law thereon as follows, to wit:

74 First. This action is brought by the plaintiffs to recover damages for the alleged breach by the defendant of the covenants contained in article eighth of the contract set out and made a part of the plaintiffs' declaration, of which said article the following is a copy, to wit:

"8th. In consideration of the agreement aforesaid the said party of the first part agrees that the total amount of grain received at said elevators from the party of the first part shall be at least 5,000,000 bushels on an average for each year during the term of this lease, and in case it shall fall short of that amount the said party of the first part agrees to pay to the said parties of the second part one cent per bushel on the amount of such deficiency, settlements to be made at the close of each year, and whenever it shall appear at the close of any year that the total grain received during so much of the term of this lease as shall then have elapsed does not amount to an average of 5,000,000 bushels for each year the party of the first part shall pay to the parties of the second part one cent per bushel for the amount of such deficiency; but in case it shall afterwards appear that the total amount received up to that time equals or exceeds the average of 5,000,000 per annum the amount so paid the parties of the second part shall be refunded, or so much thereof as the receipts of the year shall have exceeded

75 5,000,000 bushels, so that the whole amount paid on account of deficiency shall be refunded should the total receipts for the entire term equal or exceed 50,000,000 in all or an average of 5,000,000 bushels for each year."

The plaintiffs charge that the total amount of grain received in the elevators mentioned in said indenture during the years 1886 and 1887 did not equal the ten million bushels, or five million

bushels on an average for each of said years, covenanted by the defendant in said indenture to be therein received during those years; but, on the contrary, that the total amount of grain received in said elevators during said two years, allowing to said defendant a full storage capacity in said elevators of one million bushels stipulated for in said indenture, was less than ten million bushels promised to be therein delivered by the defendant during said years of 1886 and 1887 by 3,782,602, and that by reason of such deficiency the said defendant became and was liable to pay to the plaintiffs the sum of one cent per bushel, or an aggregate sum of $37,826.02.

The defendant denies all breaches of said covenants and charges that during said years of 1886 and 1887 said defendant received in the city of Chicago for delivery for storage in the said elevators the full amount of ten million bushels of grain, and was ready and willing to deliver the same, and did then and there offer and tender the same to the said plaintiffs for storage, and charges that
76 the plaintiffs failed and refused to receive said amount of grain for storage.

And that said plaintiffs refused to receive for storage the full amount of such deficiency charged in said breach, and charges full performance of all the covenants in said breaches assigned to be kept and performed by the defendant.

Therefore, if the court finds from the evidence that defendant was ready and willing to deliver during said years of 1886 and 1887 in said elevators or tendered the plaintiffs for storage during said time said amount of ten million bushels of grain, and that said plaintiffs would not or could not receive the same for storage or refused to receive the same for storage when tendered, there is no breach by the defendant of said covenant as charged in said declaration and the plaintiffs cannot recover.

Second. The defendant further requests the court to hold that said article eight of said contract is void for want of mutuality, and that under said contract and the evidence there is no valid and mutual binding contract between the plaintiffs and the defendant, the one to deliver not less than 5,000,000 bushels of grain per annum and the other to receive and handle the same.

Third. That the evidence wholly fails to support the plaintiffs' claim as alleged in the declaration and judgment; therefore should be given for the defendant.

77 Fourth. That if the court shall find that there is no evidence that the plaintiffs have suffered any damages by reason of the alleged breaches of the contract as set forth and charged in the declaration, then the court shall hold that the plaintiffs cannot recover.

Fifth. If the court shall find that under the contract and the evidence the plaintiffs did not covenant to furnish more than one million bushels of storage capacity, nor to receive, handle, and store more than one million bushels of grain at a time, then the defendant requests the court to hold that the plaintiffs cannot recover of the defendant, either by way of storage or damages or penalty, any

sum for grain tendered by the defendant and refused by the plaintiffs.

Sixth. It was admitted by the plaintiffs in open court that during the years 1886 and 1887 8,685,269 bushels of grain were tendered by the defendant to the plaintiffs for storage in said elevators, but that the plaintiffs could not receive the same for the reason that the said elevators during said time were filled with grain; and if the court finds from the evidence on said admissions that during said years the plaintiffs could not or would not receive the grain so tendered, and that the defendant, in the regular course of its business as a carrier, was compelled to seek storage for said grain transported over its line in other elevators situated on other railroads, and to pay additional charges therefor, then the defendant requests
78 the court to hold that there has been no breach of said contract on the part of the defendant as charged in said declaration and the plaintiffs cannot recover.

Seventh. If the court finds from the evidence that under said contract the plaintiffs covenanted to receive from the defendant and furnish the defendant continuous storage during said years of 1886 and 1887 for only one million bushels of grain, and that during said time the defendant did deliver the plaintiffs for continuous storage said one million bushels of grain and did deliver to the plaintiffs at said elevators all the grain that the plaintiffs could therein handle during said time, then the court should hold as a proposition of law that the defendant is not guilty of any breach of covenant in this respect and the plaintiffs cannot recover.

Eighth. If the court should find that during the said years of 1886 and 1887 the defendant delivered to the plaintiffs at said elevators for storage all the grain that the plaintiffs could therein handle, and that during said period of time said defendant tendered the plaintiffs for storage in the said elevators a large amount of other grains which the plaintiffs could not or would not receive for storage, and also that said elevators were during said years filled with grain delivered by the defendant to the extent of their capacity, then the court should hold that the plaintiffs have sustained no damage by reason of said alleged breach of covenant and they cannot recover.

79 Ninth. The defendant further requests the court to hold, as a matter of law, that the agreement in said article eight that the "party of the first part shall pay the parties of the second part one cent per bushel on the amount of any deficiency of grain received at said elevators, as provided in said article, is not liquidated damages, but, on the contrary, is either a penalty or in the nature of a penalty, which requires proof of actual damages before a recovery can be had of such penalty or any portion thereof.

Tenth. There is no evidence in the case of any actual damages which entitle the plaintiff to recover either all or any portion of the penalty at one cent per bushel, as set forth in said article eight, and therefore the plaintiffs cannot recover.

But the court refused each and all of the foregoing requests, and

to hold as thereby requested; to which refusal and ruling of the court the defendant at the time duly excepted.

And thereupon the court, after hearing all the evidence of the respective parties, makes the following special findings of fact, to wit:

First. That on the 18th day of February, A. D. 1880, the said parties entered into a certain agreement, in writing, of which the following is a copy, to wit:

This agreement, made this eighteenth day of February, A.
80 D. 1880, between The Chicago, Milwaukee & St. Paul Railway Company, party of the first part, and Jesse Hoyt, Alfred M. Hoyt, Theodore I. Husted, and Leonard Hazeltine, doing business under the firm name and style of Jesse Hoyt & Company, of the city of New York, and Perry H. Smith and George L. Dunlap, of the city of Chicago, parties of the second part, witnesseth:

1st. The said party of the first part hereby leases, demises, and lets for the period of ten (10) years from the 1st day of January, 1881, to the said party of the second part lots three (3), four (4), and five (5) of block K of the original town of Chicago at an annual rental of three thousand eight hundred and fifty dollars ($3,850), to be paid quarterly on the first day of January, April, July, and October of each year, together with all taxes and assessments that may be levied upon said premises during the term of said lease.

2nd. The said parties of the second part agree to erect, build, and construct on said lots three (3), four (4), and five (5) a grain elevator of the capacity of seven hundred thousand (700,000) bushels or more during the year 1880, and further agree to complete the same ready for business with all reasonable dispatch, said elevator to be constructed in the usual manner of grain elevators in the city of Chicago and in all respects to be a first-class elevator, with suitable and proper foundations and machinery, with proper bins for
81 storing different kinds of grain and different grades, with all the modern improvements and appurtenances of a first-class elevator for the transaction of the business of receiving, storing, and discharging grain, and to construct to the satisfaction of the said party of the first part in these respects.

3rd. The said party of the first part agrees to lay all necessary tracks adjacent to said elevator to connect its railway therewith for the purpose of delivering grain in cars thereto, and keep the same in proper repair during the time of this lease, and agrees to deliver on said tracks in cars at said elevator to the parties of the second part all the grain that may be brought by its railway consigned to parties in the city of Chicago, so far as the party of the first part can legally control the same, for handling and storage in said elevator.

4th. The said parties of the second part agree to receive, handle, and store said grain as delivered in the usual manner of handling grain in the city of Chicago to the extent of the capacity of said elevator so to be constructed, and in addition agree that they will use for the same purpose, so far as their other engagements will allow, the elevator now standing on lots one (1) and two (2) of said block,

and that said party of the first part shall at all times be entitled to storage for its grain to the extent of at least one million bushels.

82 The parties of the second part, with the consent of the party of the first part, may receive grain for storage from other parties and from river and canal craft; but in case such grain is so received so as to reduce the capacity of the parties of the second part to accommodate the party of the first part to the extent of one million bushels in said elevators the said parties of the second part agree to furnish storage in other elevators to the party of the first part to the extent that their capacity is so reduced without expense to said party of the first part for switching or otherwise.

5th. It is mutually agreed between said parties that the said parties of the second part may charge for said storage and building a rate not exceeding one and one-fourth (1¼) cents per bushel for first storage, provided such rate is allowed by law and does not exceed the customary rate charged by the elevators transacting the business of competing roads in the city of Chicago, to wit, the Chicago & Northwestern railway and the Chicago, Rock Island & Pacific railway, the Illinois Central railway, and the Chicago, Burlington & Quincy railway; and it is further mutually agreed that the charge for first and other storage to be made by the parties of the second part shall at all times during the continuance of this lease be the same as the storage charged in the city of Chicago by the elevators above mentioned, not exceeding, however, the rate of one and one-fourth cents per bushel for first storage; but in

83 case first storage (for ten days) shall be reduced below one cent per bushel for any cause and said parties of the second part shall in writing request the same to be raised to one cent per bushel the party of the first part shall, within ten (10) days after receiving such request, elect either to pay one cent per bushel for first storage or to terminate the said contract and take and pay for said elevators and real estate as hereinafter provided.

6th. It is further mutually agreed that in case of destruction of the elevator now standing on said lots or the elevator to be built by the said parties of the second part by fire or other casualty that the same shall be rebuilt by the parties of the second part with all reasonable dispatch; and

It is further agreed that said parties of the second part will save the said party of the first part free and harmless from all loss or damage by fire to said elevators or contents during the continuance of this lease from any cause whatever.

7th. It is further mutually agreed that in case the law requiring weighers to be appointed by the State should be repealed, and such weighers are appointed by the parties of the second part, and complaint shall then be made to the party of the first part as to the correctness or manner of weighing the grain, or if the said party of the first part shall be dissatisfied with the action of the par-

84 ties of the second part in that respect, that the party of the first part may appoint weighers to attend to the weighing of all grain into and out of said elevators, and that the said parties

of the second part will pay the parties so appointed for their services and pay all expenses of said weighing.

It is further agreed that the parties of the second part will at all times keep a force at said elevators sufficient to transact all business that may be offered by said party of the first part, and that cars of grain will be received and unloaded, when the business of the party of the first part requires it, in the night time or on Sundays, and that said business will be despatched with equal and as great facility in that respect as at any of the elevators in the city of Chicago above mentioned, so as not to delay the cars of the party of the first part unreasonably or unnecessarily.

8th. In consideration of the agreement aforesaid the said party of the first part agrees that the total amount of grain received at said elevators from the party of the first part shall be at least five million bushels, on an average, for each year during the term of this lease, and in case it shall fall short of that amount the said party of the first part agrees to pay to the said parties of the second part one cent per bushel on the amount of such deficiency, settlements
85 to be made at the close of each year; and whenever it shall appear at the close of any year that the total grain received during so much of the term of this lease as shall then have elapsed does not amount to an average of five million bushels for each year, the party of the first part shall pay to the parties of the second part one cent per bushel for the amount of such deficiency; but in case it shall afterwards appear that the total amount received up to that time equals or exceeds the average of five million — per annum, the amount so paid the parties of the second part shall be refunded, or so much thereof as the receipts of the year shall have exceeded five million bushels, so that the whole amount paid on account of deficiency shall be refunded should the total receipts for the entire term equal or exceed fifty million bushels in all, on an average of five million bushels for each year.

9th. In addition to the rent above reserved the said parties of the second part agrees to pay all taxes and assessments that may be levied upon said premises during the term hereby demised to keep said buildings and the docks in front thereof in proper repair and condition for the transaction of business at said elevators, and that the business of the party of the first part shall at all times be transacted with expedition and with as much facility as similar business is transacted at any of the elevators above named.

86 10th. It is further mutually agreed that all line cars for shipments of grain out from the elevators are to have free access over the tracks of the party of the first part on as favorable terms as are granted them at the other elevators above mentioned; and, further, in case the said party of the first part shall require additional storage exceeding said 1,000,000 bushels, or the amount that can be furnished by the said parties of the second part at both the elevators on the lots above described, to wit, the elevator now standing on lots one and two, in block K, and the one to be built, that the party of the first part shall give to the parties of the

second part the option of furnishing such storage on the terms herein prescribed.

And it is further mutually agreed that said business of handling and storing said grain shall be done in the usual manner of transacting such business in the city of Chicago in all respects, and to the satisfaction of the superintendent of the party of the first part.

But in case the party of the first part shall in writing notify the parties of the second part that the first party requires additional storage, as above provided, and shall furnish the proper grounds therefor at an annual rental of seven per cent. per annum on an amount equal to the cost thereof, together with taxes and
87 assessments, the parties of the second part shall decline or fail to furnish it within a reasonable time, the party of the first part may elect to terminate this contract on account of such failure, and in that event the party of the first part shall take the lots one and two of block K and the elevator now standing thereon, together with the elevator to be constructed on the lots hereby demised, in the manner and on the terms hereinafter provided, and on receiving payment as hereinafter provided, the second parties agree to make a conveyance of said lots one and two of block K and of the elevator standing thereon, and also the elevator to be constructed on lots three, four, and five of said block K, free and clear of all incumbrances to the party of the first part and surrender possession thereof to it.

11th. It is further mutually agreed and understood that so much of lots three, four, and five of said block K as is not required for the uses, purposes, and operation of the elevator to be constructed by the parties of the second part may be used by the party of the first part during the continuance of this contract for railroad tracks and other purposes connected with its business.

12th. It is further mutually agreed that at the expiration or sooner termination of this lease the said party of the first part, unless by mutual consent the lease is renewed for an addi-
88 tional term, shall purchase the elevator now standing on lots one and two, together with said lots, and also the elevator to be constructed on lots three, four, and five, and also any additional elevator that may be built under the terms of this agreement, at their then value in cash; and if the parties hereto are unable to agree upon the price to be paid therefor, the same shall be fixed by arbitration as follows:

Each of the parties hereto shall appoint one arbitrator, and the persons so appointed shall elect a third, and the three persons so appointed shall examine said buildings and lots and determine the price to be paid by the said party of the first part to the parties of the second part therefor, and the award of the said arbitrators so made, or the majority of them, shall be binding on the parties hereto, and on payment thereof by the party of the first part to the parties of the second part a conveyance of the lots and possession of said buildings, together with all machinery and appurtenances, shall be forthwith delivered to the party of the first part.

13th. It is further mutually agreed and understood that as between the parties composing the parties of the second part Jesse Hoyt & Company own three-fourths interest, and the said Perry H. Smith and George L. Dunlap together have one-fourth interest in this contract.

In witness whereof the parties to these presents have here-
89 unto put their names and seals the day and year first above written.

[SEAL.] THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.
(Signed) ALEX. MITCHELL, *President.*
Attest: F. G. RANNEY, *Secretary pro Tem.*
(Signed) JESSE HOYT. [SEAL.]
(Signed) ALFRED M. HOYT. [SEAL.]
(Signed) THEODORE I. HUSTED. [SEAL.]
(Signed) LEONARD HAZELTINE. [SEAL.]
(Signed) PERRY H. SMITH. [SEAL.]
(Signed) GEO. L. DUNLAP, [SEAL.]
By P. H. SMITH.

90 By way of supplement to the agreement dated February eighteenth, 1880, made between the Chicago, Milwaukee & St. Paul Railway Company, party of the first part, and Jesse Hoyt, Alfred M. Hoyt, Theodore I. Husted, and Leonard Hazeltine, doing business under the firm name and style of Jesse Hoyt & Company, of the city of New York, and Perry H. Smith and George L. Dunlap, of the city of Chicago, parties of the second part—

It is hereby agreed between the parties hereto, and with like legal effect as if the provisions hereof were incorporated in said original agreement, as follows, viz:

First. Article one of said contract is hereby amended by adding at the end of said article the words "and the party of the first part further agrees to give possession of said lots to the parties of the second part on or before the first day of May, 1880."

Second. Article six of said contract is hereby amended by adding at the end of said article the words "excepting the same be occasioned by wilful or wanton negligence of the said party of the first part."

Third. Article seven of said contract is hereby amended by inserting after the word "Sundays" the words "upon special request of the general manager of said party of the first part, and when such request is for Sunday work it shall be made on or before the Saturday previous."

91 CHICAGO, MILWAUKEE & ST. PAUL
[SEAL] RAILWAY COMPANY,
(Signed) By ALEX. MITCHELL, *President.*
Attest: F. G. RANNEY, *Secretary pro Tem.*
(Signed) JESSE HOYT. [SEAL.]
(Signed) ALFRED M. HOYT. [SEAL.]
(Signed) THEODORE I. HUSTED. [SEAL.]
(Signed) LEONARD HAZELTINE. [SEAL.]
(Signed) PERRY H. SMITH. [SEAL.]
(Signed) GEO. L. DUNLAP. [SEAL.]
By P. H. SMITH.

92 Second. That said elevator was constructed upon the lots named in said agreement and was completed within the time and in accordance with the terms and conditions of said agreement, on or about the 24th day of December, A. D. 1880, with a working capacity of 750,000 bushels; that the storage or working capacity of the elevator known as the Fulton elevator was 350,000 bushels, both elevators affording storage and working capacity of about 1,100,000 bushels of grain, and that the cost of constructing said new elevator was about the sum of $200,000.

Third. That the said Munger, Wheeler & Company, as assignees of Jesse Hoyt & his associates, built said new elevator and have controlled and operated both elevators since December, 1880, and are now operating the same, and that said firm during said time also owned and controlled six other elevators, all located in the city of Chicago, upon other railroads entering into said city, and that at the present time said firm controls and operates in all eight grain elevators in said city, with an aggregate storage or working capacity of about 6,000,000 bushels of grain.

Fourth. That in the year 1886 the plaintiffs received from the defendant, for store in the St. Paul or new elevator, 1,923,339 bushels of grain, and in the Fulton elevator 903,482 bushels, and also

93 that the plaintiffs received from the defendant for storage 432,985 bushels of grain in the Union elevator, located on the Chicago & Alton railroad, in the city of Chicago, making a total for the year 1886 of grain received by the plaintiffs from the defendant of 3,259,806 bushels, all of which is credited to the defendant in its account for that year.

That in the year 1887 the plaintiffs received from the defendant in the new or St. Paul elevator 2,300,292 bushels of grain and in the Fulton elevator 657,300 bushels of grain, making a total of 2,950,592 bushels of grain received by the plaintiffs from the defendant during the year 1887.

That all the grain received and handled by the plaintiffs in the Fulton and St. Paul elevators during said years was received from the Chicago, Milwaukee & St. Paul Railway Company.

Fifth. The court further finds that the plaintiffs admitted in open court that during the years 1886 and 1887 grain was tendered by the defendant to the plaintiffs for storage, and that it could not be received for the reason that the plaintiffs' warehouses were filled; that the grain so tendered amounted to 8,685,269 bushels, and that the plaintiffs never declined to receive shipments of grain from the defendant when such elevators had capacity to receive it within 1,000,000 bushels, and that when the plaintiffs refused to

94 receive further grain for storage the defendant was notified that it occupied the entire capacity stipulated for in the contract at the time plaintiffs declined to receive the grain so tendered, to wit, 1,000,000 bushels.

Sixth. That for the year 1886 the defendant paid for switching grain to other elevators when the plaintiffs were unable and therefore refused to accept the same the sum of $2,871.00, and in the year 1887 the sum of $9,962.35, and that the cost of train service for the

defendant in delivering such grain to other elevators amounted to about the same sum.

That the defendant also, during said year, contracted with parties having grain stored in said elevators to remove the same in order to furnish more room for the defendant; that for the removal of 100,000 bushels the defendant paid the owners thereof $15,000.00, and that after such removal the plaintiffs refused to receive from the defendant for storage more than 40,000 bushels in place of the grain that had been so removed for the reason that that amount of additional grain exhausted the storage and hauling capacity of said two elevators; that it was to the interest of the defendant to deliver all the grain to the plaintiffs at said St. Paul and Fulton elevators during said years.

That during the two years in controversy the entire
95 storage capacity of said elevators was constantly occupied by grain received from the defendant's cars, and, although the plaintiffs refused to receive additional grain tendered by the defendant during the same period, their refusal was always based upon the ground that their elevators were full and contained more that 1,000,000 bushels of grain received from the defendant.

That at *one* time during the said years 1886 and 1887 did the plaintiffs refuse to receive grain from the defendants for storage in said elevators when there was any unoccupied storage space in the same, and that some of the grain so delivered and stored during said years remained in said elevators so long that the plaintiffs were not able to receive or handle for defendant during said years the amount of grain contemplated by the contract or the full amount actually tendered by defendant, and that but for this unusual condition the plaintiffs would have received and stored all the grain tendered by the defendant.

Seventh. The court further finds that the plaintiffs' regular charges for storage of grain in said elevators during the years 1886 and 1887 were three-quarters of a cent per bushel for the first ten days and one-half of a cent per bushel for the subsequent ten days, and for every thirty days the storage charges were one cent and three-quarters per bushel; that for 1,000,000 bushels
96 stored in such elevators and continued therein for one year the regular storage charges for the same during the years 1886 and 1887 would be at the rate of $150,000 for each 1,000,000 bushels for the term of one year; that if said elevators could be kept employed with first storage—that is, if 1,000,000 bushels could pass through said elevators each ten days—the charges for a year would amount to about $270,000.

That the length of time that said grain remained in store was not regulated or controlled by either the plaintiffs or defendant, but by the shippers or owners of such grain.

Eighth. That the plaintiffs have kept the account of all their elevators together and therefore could not state the earnings of the elevators in question for the years 1886 and 1887.

Ninth. There is no evidence of the amount of earnings of said St. Paul and Fulton elevators during the years 1886 and 1887 or of the

income of the plaintiffs derived from the storage of grain or charges thereon in said elevators during said period of time, nor is there any evidence of any actual damages sustained by the plaintiffs by reason of their not handling in said elevators during said years the full amount of 10,000,000 bushels of grain or by reason of the
97 alleged breach of covenant by the defendant other than the one cent per bushel for the years 1886 and 1887, as prescribed by article 8 of the contract.

And thereupon the defendant moved the court to enter judgment in its favor upon said special findings of fact, which said motion the court denied; to which ruling of the court the defendant then and there duly excepted.

And thereupon the court found for the plaintiffs and rendered the following opinion in said cause:

On the 18th day of February, 1880, the defendant leased to the plaintiffs for a term of ten years from January 1st, 1881, lots 1, 2, and 3, in block K of the original plat of the town of Chicago.

The plaintiffs agreed to erect on the lots during the year 1880 an elevator with storage capacity of 700,000 bushels, which they did, and to pay an annual ground rent of $3,850 and all taxes and assessments levied against the premises; furnish the defendant at all times during the term with storage capacity for at least one million bushels of grain in the elevator to be erected and in another elevator then owned by the plaintiffs and standing on lots 1 and 2 of the same block, having storage capacity of about 350,000 bushels.

The plaintiffs also agreed that if, in the ordinary course of their business, the capacity of the two elevators should enable them to do so, they would receive and store all the grain carried
98 by the defendant to Chicago for consignment.

The eighth article of the contract reads as follows:

"In consideration of the agreement aforesaid, the said party of the first part (the defendant) agrees that the total amount of grain received at said elevators shall be at least five million bushels on an average for each year during the term of this lease; and in case it shall fall short of that amount the said party of the first part agrees to pay to the said party of the second part one cent per bushel on the amount of such deficiency, settlements to be made at the close of each year; and whenever it shall appear at the close of any year that the total of grain received during so much of the term of this lease as shall then have elapsed does not amount to an average of five million bushels for each year the party of the first part shall pay to the party of the second part one cent per bushel for the amount of such deficiency; but in case it shall afterwards appear that the total amount received up to that time equals or exceeds the average amount of five million bushels per annum the amount so paid to the party of the second part shall be refunded or so much thereof as the receipts of the year shall have exceeded five million bushels, so that the whole amount paid on account of defi-
99 ciency shall be refunded should the total receipts for the entire term equal or exceed fifty million bushels in all or an average of five million bushels for each year."

In 1886 the plaintiffs received from the defendant and stored in the two elevators 3,259,806 bushels of grain, and in 1887 they received and stored 2,957,592 bushels, the amount received during each of the two years less than 5,000,000 bushels being 1,740,191 and 2,042,408 bushels respectively.

During this period the entire storage capacity of the elevators was constantly occupied by grain received from the defendant's cars, and although the plaintiffs repeatedly refused to receive additional grain tendered by the defendant during the same period, their refusal was always based upon the ground that the elevators were full and contained more than one million bushels.

The plaintiffs insist that under the contract the defendant owes them one cent per bushel upon the deficiency of the receipts above shown and demand judgment for that amount.

By the third article of the contract the defendant agreed that so far as it could legally control the same it would deliver to the plaintiffs for storage all the grain it carried to Chicago, and by the article quoted the defendant guaranteed that the plaintiffs could annually receive into the two elevators for storage at least
100 five million bushels, and if during any year of the lease the plaintiffs should receive less than that amount, whether tendered or not by the defendant, it would pay the plaintiffs one cent per bushel on the difference between the amount actually received and five million bushels.

Under ordinary conditions the plaintiffs could and would have received from the defendant and stored in the two elevators more than the guaranteed amount of grain.

One of the plaintiffs testified that in a single year he had received and stored in an elevator of less than one million bushels capacity ten million bushels of grain.

The defendant knew that grain stored in the elevators would remain there until ordered out by the consignees, and that the ability of the plaintiffs to annually receive five million bushels in elevators containing storage capacity of only one-fifth that amount would depend upon the action of the consignees.

It happened that during the years 1886 and 1887 the grain received into the elevators from the defendant's cars remained in store so long that the plaintiffs were unable to receive the full amount they were entitled to handle under the contract.

The parties contemplated that this might occur and in their agreement provided for such a contingency.

101 In consideration of the premises of the plaintiffs and the facilities to be furnished by them to the defendant for the storage of grain carried by the latter to Chicago the defendant agreed and bound itself to do certain things specified in the contract, one of which was that if with a storage capacity of one million bushels the plaintiffs should not be able to receive and handle five million bushels annually and earn commissions on that basis the defendant would pay to the plaintiffs one cent per bushel on the deficiency.

If this is not what the parties intended why was the word "receive" used as it appears in the eighth article?

The meaning of the contract is plain enough when it is interpreted in view of the situation of the parties and the known methods of receiving, storing, and handling grain in elevators at Chicago.

The court therefore finds that there is due the plaintiffs from the defendant for the deficiency in the year 1886 $17,401.94 and interest thereon from the first day of January, 1887, to September 25th, 1889, $2,854.88, and for the year 1887 on account of such deficiency the sum of $20,434.08, together with interest thereon from January first, 1887, to September 25th, 1889, $2,125.23, making a sum
102 total on account of such deficiency and interest of $42,806.13.

The court further finds that there is due the defendants from plaintiffs, on account of ground rent for the year 1886, the sum of $3,850, payable in quarterly installments, together with interest therein from maturity of each quarterly payment to September 25th, 1889; also for the year 1887 the ground rent and interest as for the year 1886, making a total of credits on account of ground rent and interest of $9,022.30, leaving a balance due from the defendant to plaintiffs of $33,783.83.

W. Q. GRESHAM.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

ALFRED M. HOYT, THEODORE I. HUSTED, LEONARD HAZELTINE, and G. L. Dunlap, Survivors of Jesse Hoyt and Perry H. Smith, Deceased, for the Use of Munger, Wheeler & Company,
*vs.*
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

103 Now comes the defendant in the above-entitled cause, by E. Walker, its attorney, and moves the court for a new trial for the following causes, to wit:

First. The court erred in overruling the propositions of law requested by the defendant.

Second. The court erred in finding for the plaintiffs and assessing their damages at the sum of $42,806.13, on account of the deficiency in the amount of grain received for storage and handling from the defendant in the years 1886 and 1887.

Third. The findings of fact do not support or tend to support the damages found by the court.

Fourth. The court erred in its construction of the contract between the plaintiffs and the defendant.

E. WALKER,
*Attorney for Defendant.*

(Endorsed:) Filed Oct. 1, 1889. Wm. H. Bradley, clerk.

104 On the same day, to wit, on the first day of October, in the July term of said court, 1889, in the record of the proceed-

ings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

*Judgment.*

| | |
|---|---|
| ALFRED M. HOYT, THEODORE I. HUSTED, LEONARD Hazeltine, and George L. Dunlap, Survivors of Jesse Hoyt and Perry H. Smith, Deceased, who Sue for the Use of Munger, Wheeler & Co., *vs.* THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. | Covenant. |

Now come the parties, by their attorneys, and the court, having considered and being now fully advised upon the matters heretofore submitted herein, finds the issues for the plaintiffs and assesses the plaintiffs' damages at thirty-three thousand seven hundred and eighty-three dollars and eighty-three cents; and thereupon the defendant, by its attorney, moves the court for a new trial herein; and the court, being now fully advised upon said motion for a new trial, overrules the same and awards judgment; to which ruling of the court the defendant, by its attorney, now excepts.

It is thereupon considered and adjudged by the court that
105 said plaintiffs do have and recover of said defendant the said sum of thirty-three thousand seven hundred and eighty-three dollars and eighty-three cents, their damages so as aforesaid assessed, together with their costs and charges in this behalf expended, amounting to — dollars and -- cents, and that they have execution therefor.

Afterward, to wit, on the seventh day of October, 1889, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

106 Know all men by these presents that we, The Chicago, Milwaukee & St. Paul Railway Company, as principal, and Phillip D. Armour, as surety, are held and firmly bound unto Alfred M. Hoyt, Theodore I. Husted, Leonard Hazletine, and G. L. Dunlap, survivors of Jesse Hoyt and Perry H. Smith, deceased, for the use of Munger, Wheeler & Company, in the full and just sum of forty thousand dollars, to be paid to the said Alfred M. Hoyt, Theodore I. Husted, Leonard Hazletine, and G. L. Dunlap, survivors of Jesse Hoyt and Perry H. Smith, deceased, for the use of Munger, Wheeler & Co., their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas, lately, at a regular term of the circuit court of the United States for the northern district of Illinois, to wit, on the 2nd day of October, A. D. 1889, in a suit depending in said court between Alfred

M. Hoyt, Theodore I. Husted, Leonard Hazletine, and G. L. Dunlap, survivors of Jesse Hoyt and Perry H. Smith, deceased, for the use of Munger, Wheeler & Company, plaintiffs, a judgment was rendered against the said Chicago, Milwaukee & St. Paul Railway Company, defendant, and the said Chicago, Milwaukee & St. Paul Railway Company, defendant, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Alfred M. Hoyt, Theodore I. Husted, Leonard Hazle-
107 tine, and G. L. Dunlap, survivors of Jesse Hoyt and Perry H. Smith, deceased, for the use of Munger, Wheeler & Company, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Chicago, Milwaukee & St. Paul Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, [SEAL.]

[SEAL.] By P. M. MYERS, *Sec'y.*

PHILIP D. ARMOUR. [SEAL.]

Approved by—

H. W. BLODGETT, *Judge.*

Endorsed: Filed Oct. 7, 1889. Wm. H. Bradley, clerk.

108 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein Alfred M. Hoyt, Theodore I. Husted, Leonard Hazeltine, and G. L. Dunlap, survivors of Jesse Hoyt and Perry H. Smith, deceased, who sue for the use of Munger, Wheeler and Company, are plaintiffs and The Chicago, Milwaukee and St. Paul Railway Company is defendant, as the same appears from the records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, northern division, this ninth day of October, 1889.

WM. H. BRADLEY, *Clerk.*

109 UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois,* }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you, in said circuit court, between Alfred M. Hoyt, Theodore I. Husted, Leonard Hazeltine, and G. L. Dunlap, survivors of Jesse Hoyt and Perry H. Smith, deceased, for the use of Munger, Wheeler and Company, plaintiffs, and Chicago, Milwaukee and St. Paul Railway Company, defendant, in an action of covenant, a manifest error hath happened, to the great damage of the said Chicago, Milwaukee and St. Paul Railway Company, defendant, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1889, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this seventh day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 114th year.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

WM. H. BRADLEY,
*Clerk of the Circuit Court of the United States for the Northern District of Illinois.*

110 [Endorsed:] Supreme Court of the United States. Chicago, Milwaukee and St. Paul Railway Company, plaintiff in error, *vs.* Alfred M. Hoyt *et al.*, defendants in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

111 UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois,* }

To Alfred M. Hoyt, Theodore I. Husted, Leonard Hazeltine, and G. L. Dunlap, survivors of Jesse Hoyt and Perry H. Smith, deceased, for the use of Munger, Wheeler & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday of October, A. D. 1889, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Alfred M. Hoyt *et al.* are plaintiffs and Chicago, Milwaukee and St. Paul Railway Company is defendant, to show cause, if any there be, why the error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge, this 7th day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

H. W. BLODGETT, *Judge.*

Service of this citation admitted this 12th day of October, A. D. 1889.

JNO. N. JEWETT,
*Attorney for Pl'fts.*

112 [Endorsed:] Supreme Court of the United States. —— —— *vs.* —— ——. Citation to October term, A. D. 1889.

Endorsed on cover: Case No. 13,770. N. Illinois C. C. U. S. No. 515. The Chicago, Milwaukee & St. Paul Railway Company, plaintiff in error, *vs.* Alfred M. Hoyt, Theodore I. Husted, Leonard Hazeltine, and G. L. Dunlap, survivors of Jesse Hoyt and Perry H. Smith, deceased, for the use of Munger, Wheeler & Company. Filed October 14, 1889.

SUPREME COURT OF THE UNITED STATES.

STATE OF ILLINOIS, } ss:
*Cook County,* }

In the Circuit Court of the United States, Northern District of Illinois.

HOYT *et al.*
*vs.*
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

And the said Chicago, Milwaukee and St. Paul Railway Company comes and defends, etc., and says that it hath not broken the said covenants in the said declaration mentioned, or any or either of them, in manner and form as the said plaintiffs have complained against it; and of this the said defendant puts itself upon the country.

EDWIN WALKER,
*Attorney for Defendant.*

It is hereby stipulated by the respective parties in the above-entitled cause that the defendant filed the above plea on the ninth day of January, 1889, and that said copy shall stand in the place of said original plea, which has been lost from the files of the court.

EDWIN WALKER,
*Attorney for Defendant.*
JNO. N. JEWETT,
*Att'y for Appellees.*

Endorsed on cover: Case No. 13,770. Supreme Court U. S., October term, 1892. Term No., 180. The Chicago, Milwaukee & St. Paul Railway Co., pl'ff in error, *vs.* A. M. Hoyt *et al.* Stipulation and amendment to record. Office Supreme Court U. S. Filed Oct. 10, 1892. James H. McKenney, clerk.

180/1494.81

Office Supreme Court U. S.
FILED.
MAR 18 1893
JAMES H. McKENNEY,
CLERK.

IN THE

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, A. D. 1892.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,

*Plaintiff in Error,*

*vs.*

ALFRED M. HOYT, THEODORE I. HUSTED, LEONARD HAZELTINE, AND G. L. DUNLAP, SURVIVORS OF JESSE HOYT AND PERRY H. SMITH, DECEASED, FOR THE USE OF MUNGER, WHEELER & COMPANY,

*Defendants in Error.*

# BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

EDWIN WALKER,
ATTORNEY.

JOHN W. CARY,
OF COUNSEL.

IN THE

# Supreme Court of the United States.

## OCTOBER TERM, A. D. 1892.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,

*Plaintiff in Error,*

*vs.*

ALFRED M. HOYT, THEODORE I. HUSTED, LEONARD HAZELTINE, AND G. L. DUNLAP, SURVIVORS OF JESSE HOYT AND PERRY H. SMITH, DECEASED, FOR THE USE OF MUNGER, WHEELER & COMPANY,

*Defendants in Error.*

## STATEMENT OF CASE.

On the 18th day of February, A. D. 1880, the respective parties to this action entered into a certain indenture of lease. The railway company was the owner of lots 3, 4 and 5 of block K, of the original Town of Chicago, and the defendants in error of lots 1 and 2 of the same block, together with an elevator located thereon, for the storage of grain.

By the terms of the lease, the plaintiff in error let and demised to the defendants said lots 3, 4 and 5 for a term of ten years from the first day of January, A. D. 1881, at an annual rental of $3,850, payable in quarterly instalments.

Defendants in error agreed, upon their part, to construct, and did construct, on lots 3, 4 and 5, a grain elevator of the capacity of seven hundred thousand bushels.

There are several dependent and independent covenants contained in the agreement.

On the 26th of May, 1888, defendants in error commenced this action against the plaintiff in error, in the Superior court of Cook county, to recover damages for alleged breach of contract. The form of action was assumpsit, but subsequently, upon the motion of plaintiff, the form was changed to covenant.

Upon petition of plaintiff in error, the cause was removed to the United States Circuit court for the Northern district of Illinois.

The declaration sets out the agreement *in haec verba*, and assigned five breaches of covenant, but later on (Rec., 29), the fourth and fifth assignment of breaches were withdrawn.

As the declaration then stood, the plaintiff sought only to recover damages for alleged breaches by the defendants of the covenants contained in article 8 of the contract, which said article provides as follows:

"8th. In consideration of the agreement aforesaid "the said party of the first part agrees that the total "amount of grain received at said elevators from the "party of the first part shall be at least five million "bushels, on an average, for each year during the term "of this lease, and in case it shall fall short of that amount "the said party of the first part agrees to pay to the said "parties of the second part one cent per bushel on the "amount of such deficiency, settlements to be made at "the close of each year; and whenever it shall appear

"at the close of any year that the total grain received "during so much of the term of this lease as shall then "have elapsed does not amount to an average of five "million bushels for each year, the party of the first part "shall pay to the parties of the second part one cent per "bushel for the amount of such deficiency; but in case "it shall afterwards appear that the total amount received "up to that time equals or exceeds the average of five "million bushels per annum, the amount so paid the parties "of the second part shall be refunded, or so much thereof "as the receipts of the year shall have exceeded five "million bushels, so that the whole amount paid on ac- "count of deficiency shall be refunded should the total "receipts for the entire term equal or exceed fifty mil- "lion bushels in all, or an average of five million bushels "for each year."

The breaches assigned are as follows (Rec., 10):

"FIRST BREACH: But the plaintiff's aver that notwithstanding the covenants of said indenture to be kept and performed by said defendant in this behalf, the amount of grain received from said defendant for storage during the year 1886, in the said elevators, allowing to said defendant the full storage capacity of one million bushels stipulated for in said indenture of lease and agreement, was less than the five million bushels covenanted as aforesaid by the defendant, to be received therein during said year 1886, by one million, seven hundred and forty thousand, one hundred and ninety-four (1,740,194) bushels; by reason whereof the said defendant, according to the terms and provisions of the said indenture and its covenant in such case therein provided, became and was bound to pay to said plaintiffs on account of said deficiency of 1,740,194 bushels, the sum of seventeen thousand, four hundred and one dollars and ninety-four cents ($17,401.94) at the close of said year 1886.

SECOND BREACH. The plaintiffs further aver that the amount of grain received from said defendant for storage

during the year 1887, in said two elevators, allowing to said defendant the full storage capacity of one million bushels stipulated for in said indenture, was less than the five million bushels covenanted by the defendant to be received therein during said year 1887, by two million, forty-two thousand, four hundred and eight (2,042,408) bushels, whereby the said defendant became and was liable to pay to said plaintiffs by virtue of its covenant in such case provided in said indenture, at the close of said year 1887, and for the deficiency of said year last aforesaid, the sum of twenty thousand, four hundred and twenty-four dollars and eight cents ($20,424.08).

THIRD BREACH: The said plaintiffs further aver that the total amount of grain received in the elevators mentioned in said indenture during the years 1886 and 1887, did not equal the ten million bushels or five million bushels upon an average for each of said years covenanted by the defendant in said indenture to be therein received during those years, but, on the contrary, the said plaintiffs aver that the total amount of grain received in said elevators during said two years, allowing to the defendants the full storage capacity in said elevators of one million bushels stipulated for in said indenture, was less than the ten million bushels promised to be therein received by the defendant as aforesaid during said years 1886 and 1887, by three million, seven hundred and eighty-two thousand, six hundred and two (3,782,602) bushels, and the plaintiffs aver that on account of said deficiency between the amount of grain promised by the defendant to be received in said elevators, and the amount actually received therein during said years the said defendant became and was liable to pay to the plaintiffs, according to the terms and provisions of said indenture of lease and agreement, and its further covenant in such case therein provided, the sum of one cent per bushel upon the total number of bushels constituting the deficiency of said years 1886 and 1887, whereby and by reason whereof the said defendant, by virtue of its covenant aforesaid, became liable to pay to said plaintiffs thirty-seven thousand, eight hundred and twenty-six dollars and two cents ($37,826.02), at the times and in the manner in said indenture provided."

On the 22d of January, 1889, it was stipulated that the

cause should stand for trial upon the single plea of general performance first pleaded by the defendant, and issues made thereon, with the right reserved to either party to introduce on the trial of said cause under the issue, all evidence which could be properly introduced under any issue legitimately framed under special pleas applicable to the case. (Rec., 30.)

At the December term of said court, 1888, the cause was called for hearing, and by stipulation of the parties filed, the intervention of a jury was waived and the parties put themselves upon the court for trial. (Rec., 31.)

After the evidence had been submitted by the respective parties, the defendant, by its counsel, presented the following propositions, and prayed the court to rule as a matter of law thereon, as follows, to wit:

"*First.* This action is brought by the plaintiffs to recover damages for the alleged breach by the defendant of the covenants contained in article 8 of the contract set out and made a part of the plaintiff's declaration, of which said article the following is a copy, to wit:

"8th. In consideration of the agreement aforesaid the said party of the first part agrees that the total amount of grain received at said elevators from the party of the first part, shall be at least 5.000,000 bushels on an average for each year during the term of this lease, and in case it shall fall short of that amount, the said party of the first part agrees to pay to the said parties of the second part one cent per bushel on the amount of such deficiency, settlements to be made at the close of each year, and whenever it shall appear at the close of any year that the total grain received during so much of the term of this lease as shall then have elapsed does not amount to an average of 5,000,000 bushels for each year, the party of the first part shall pay to the parties of the second part one cent per bushel for the amount of such deficiency: but in case it shall afterwards appear that the total amount received up to that time, equals, or exceeds, the

average of 5,000,000 per annum, the amount so paid the parties of the second part shall be refunded, or so much thereof as the receipts of the year shall have exceeded 5,000,000 bushels, so that the whole amount paid on account of deficiency shall be refunded, should the total receipts for the entire term equal or exeed 50,000,000 in all or an average of 5,000,000 bushels for each year."

The plaintiffs charge that the total amount of grain received in the elevators mentioned in said indenture during the years 1886 and 1887 did not equal the ten million bushels, or five million bushels on an average for each of said years, covenanted by the defendant in said indenture to be therein received during those years; but, on the contrary, that the total amount of grain received in said elevators during said two years, allowing to said defendant a full storage capacity in said elevators of one million bushels stipulated for in said indenture, was less than ten million bushels promised to be therein delivered by the defendant during said years of 1886 and 1887 by 3,782,602, and that by reason of such deficiency the said defendant became and was liable to pay to the plaintiffs the sum of one cent per bushel, or an aggregate sum of $37,826.02.

The defendant denies all breaches of said covenants, and charges that during said years of 1886 and 1887 said defendant received in the city of Chicago for delivery for storage in the said elevators the full amount of ten million bushels of grain, and was ready and willing to deliver the same, and did then and there offer and tender the same to said plaintiffs for storage, and charges that the plaintiffs failed and refused to receive said amount of grain for storage.

And that said plaintiffs refused to receive for storage the full amount of such deficiency charged in said breach, and charges full performance of all the covenants in said breaches assigned to be kept and performed by the defendant.

Therefore, if the court finds from the evidence that defendant was ready and willing to deliver during said years of 1886 and 1887 in said elevators, or tendered the plaintiffs for storage during said time said amount of ten million bushels of grain, and that said plaintiffs would not or could not receive the same for storage, or refused to

receive the same for storage when tendered, there is no breach by the defendant of said covenant as charged in said declaration, and the plaintiffs cannot recover.

*Second.* The defendant further requests the court to hold that said article eight of said contract is void for want of mutuality, and that under said contract, and the evidence, there is no valid and mutual binding contract between the plaintiffs and the defendant, the one to deliver not less than 5,000,000 bushels of grain per annum, and the other to receive and handle the same.

*Third.* That the evidence wholly fails to support the plaintiffs' claim as alleged in the declaration, and judgment therefore should be given for the defendant.

*Fourth.* That if the court shall find that there is no evidence that the plaintiffs have suffered any damages by reason of the alleged breaches of the contract as set forth and charged in the declaration, then the court shall hold that the plaintiffs cannot recover.

*Fifth.* If the court shall find that under the contract and the evidence, the plaintiffs did not covenant to furnish more than one million bushels of storage capacity, nor to receive, handle and store more than one million bushels of grain at a time, then the defendant requests the court to hold that the plaintiffs cannot recover of the defendant, either by way of storage, or damages, or penalty, any sum for grain tendered by the defendant and refused by the plaintiffs.

*Sixth.* It was admitted by the plaintiffs in open court that during the years 1886 and 1887 8,685,269 bushels of grain were tendered by the defendant to the plaintiffs for storage in said elevators, but that the plaintiffs could not receive the same for the reason that the said elevators during said time were filled with grain; and if the court finds from the evidence or said admissions, that during said years the plaintiffs could not, or would not, receive the grain so tendered, and that the defendant, in the regular course of its business as a carrier was compelled to seek storage for said grain transported over its line in other elevators situated on other railroads, and to pay additional charges therefor, then the defendant requests the court to hold that there has been no breach of said contract on the part of the defendant as charged in said declaration, and the plaintiffs cannnt recover.

*Seventh.* If the court finds from the evidence that under said contract the plaintiffs covenanted to receive from the defendant and furnish the defendant continuous storage during said years of 1886 and 1887 for only one million bushels of grain, and that during said time the defendant did deliver the plaintiffs for continuous storage said one million bushels of grain, and did deliver to the plaintiffs at said elevators all the grain that the plaintiffs could therein handle during said time, then the court should hold as a proposition of law, that the defendant is not guilty of any breach of covenant in this respect, and the plaintiffs cannotrecover.

*Eighth.* If the court should find that during the said years of 1886 and 1887 the defendant delivered to the plaintiffs at said elevators for storage all the grain that the plaintiffs could therein handle, and that during said period of time said defendant tendered the plaintiffs for storage in the said elevators a large amount of other grains which the plaintiffs could not or would not receive for storage, and also that said elevators were during said years filled with grain delivered by the defendant to the extent of their capacity, then the court should hold that the plaintiffs have sustained no damage by reason of said alleged breach of covenant, and they cannot recover.

*Ninth.* The defendant further requests the court to hold, as a matter of law, that the agreement in said article eight that the "party of the first part shall pay the parties of the second part one cent per bushel on the amount of any deficiency of grain received at said elevators," as provided in said article, is not liquidated damages, but, on the contrary, is either a penalty, or in the nature of a penalty, which requires proof of actual damages before a recovery can be had of such penalty or any portion thereof.

*Tenth.* There is no evidence in the case of any actual damages which entitle the plaintiff to recover either all or any portion of the penalty at one cent per bushel, as set forth in said article eight, and therefore the plaintiffs cannot recover."

The court refused all of said requests, to which refusal and ruling the defendant at the time duly excepted;

and thereupon the court made the following special findings, to wit (Rec., 35-44):

*First.* "That on the 18th day of February, A. D. 1880, the said parties entered into a certain agreement in writing, of which the following is a copy, to wit:

This agreement, made this eighteenth day of February, A. D. 1880, between The Chicago, Milwaukee and St. Paul Railway Company, party of the first part, and Jesse Hoyt, Alfred M. Hoyt, Theodore I. Husted and Leonard Hazeltine, doing business under the firm name and style of Jesse Hoyt & Company, of the city of New York, and Perry H. Smith and George L. Dunlap, of the city of Chicago, parties of the second part, witnesseth:

1st. The said party of the first part hereby leases, demises and lets for the period of ten (10) years from the 1st day of January, 1881, to the said party of the second part, lots three (3), four (4) and five (5), of block K, of the original town of Chicago, at an annual rental of three thousand eight hundred and fifty dollars ($3,850), to be paid quarterly on the first day of January, April, July and October of each year, together with all taxes and assessments that may be levied upon said premises during the term of said lease.

2d. The said parties of the second part agree to erect, build and construct on said lots three (3), four (4) and five (5) a grain elevator of the capacity of seven hundred thousand (700,000) bushels or more during the year 1880, and further agree to complete the same ready for business with all reasonable dispatch, said elevator to be constructed in the usual manner of grain elevators in the city of Chicago, and in all respects to be a first-class elevator, with suitable and proper foundations and machinery, with proper bins for storing different kinds of grain and different grades, with all the modern improvements and appurtenances of a first-class elevator for the transaction of the business of receiving, storing and discharging grain, and to construct to the satisfaction of the said party of the first part in these respects.

3d. The said party of the first part agrees to lay all necessary tracks adjacent to said elevator to connect its railway therewith for the purpose of delivering grain in cars thereto, and keep the same in proper repair during

the time of this lease, and agrees to deliver on said tracks in said cars, at said elevator, to the parties of the second part, all the grain that may be brought by its railway consigned to parties in the city of Chicago, so far as the party of the first part can legally control the same, for handling and storage in said elevator.

4th. The said parties of the second part agree to receive, handle and store said grain as delivered in the usual manner of handling grain in the city of Chicago, to the extent of the capacity of said elevator so to be constructed, and in addition agree that they will use for the same purpose, so far as their other engagements will allow, the elevator now standing on lots one (1) and two (2) of said block, and that said party of the first part shall at all times be entitled to storage for its grain to the extent of at least one million bushels.

The parties of the second part, with the consent of the party of the first part, may receive grain for storage from other parties and from river and canal craft; but in case such grain is so received so as to reduce the capacity of the parties of the second part to accommodate the party of the first part to the extent ot one million bushels in said elevators the said parties of the second part agree to furnish storage in other elevators to the party of the first part to the extent that their capacity is so reduced, without expense to said party of the first part for switching or otherwise.

5th. It is mutually agreed between said parties that the said parties of the second part may charge for said storage and building a rate not exceeding one and one-fourth (1¼) cents per bushel for first storage, provided such rate is allowed by law and does not exceed the customary rate charged by the elevators transacting the business of competing roads in the city of Chicago, to wit: the Chicago & Northwestern railway and the Chicago Rock Island & Pacific railway, the Illinois Central railway, and the Chicago, Burlington & Quincy railway; and it is further mutually agreed that the charge for first and other storage to be made by the parties of the second part shall at all times during the continuance of this lease be the same as the storage charged in the city of Chicago by the elevators above mentioned, not exceeding,

however, the rate of one and one-fourth cents per bushel for first storage; but in case first storage (for ten days) shall be reduced below one cent per bushel for any cause, and said parties of the second part shall in writing request the same to be raised to one cent per bushel the party of the first part shall, within ten (10) days after receiving such request, elect either to pay one cent per bushel for first storage or to terminate the said contract and take and pay for said elevators and real estate as hereinafter provided.

6th. It is further mutually agreed that in case of destruction of the elevator now standing on said lots or the elevator to be built by the said parties of the second part by fire or other casualty that the same shall be rebuilt by the parties of the second part with all reasonable dispatch; and

It is further agreed that said parties of the second part will save the said party of the first part free and harmless from all loss or damage by fire to said elevators or contents during the continuance of this lease from any cause whatever.

7th. It is further mutually agreed that in case the law requiring weighers to be appointed by the state should be repealed, and such weighers are appointed by the parties of the second part, and complaint shall then be made to the party of the first part as to the correctness or manner of weighing the grain, or if the said party of the first part shall be dissatisfied with the action of the parties of the second part in that respect, that the party of the first part may appoint weighers to attend to the weighing of all grain into and out of said elevators, and that the said parties of the second part will pay the parties so appointed for their services and pay all expenses of said weighing.

It is further agreed that the parties of the second part will at all times keep a force at said elevators sufficient to transact all business that may be offered by said party of the first part, and that cars of grain will be received and unloaded, when the business of the party of the first part requires it, in the night time or on Sundays, and that said business will be despatched with equal and as great facility in that respect as at any of the elevators in the

city of Chicago above mentioned, so as not to delay the cars of the party of the first part unreasonably or unnecessarily.

8th. In consideration of the agreement aforesaid the said party of the first part agrees that the total amount of grain received at said elevators from the party of the first shall be at least 5,000,000 bushels, on an average, for each year during the term of this lease, and in case it shall fall short of that amouut the said party of the first part agrees to pay to the said parties of the second part one cent per bushel on the amount of such deficiency, settlements to be made at the close of each year; and whenever it shall appear at the close of any year that the total grain received during so much of the term of this lease as shall then have elapsed does not amount to an average of 5,000,000 bushels for each year, the party of the first part shall pay to the parties of the second part one cent per bushel for the amount of such deficiency; but in case it shall afterwards appear that the total amount received up to that time equals or exceeds the average of 5,000,000 — per annum, the amount so paid the parties of the second part shall be refunded, or so much thereof as the receipts of the year shall have exceeded 5,000,000 bushels, so that the whole amount paid on account of deficiency shall be refunded should the total receipts for the entire term equal or exceed 50,000,000 bushels in all, or an average of 5,000,000 bushels for each year.

9th. In addition to the rent above reserved the said parties of the second part agrees to pay all taxes and assessments that may be levied upon said premises during the term hereby demised, to keep said buildings and the docks in front thereof in proper repair and condition for the transaction of business at said elevators, and that the business of the party of the first part shall at all times be transacted with expedition and with as much facility as similar business is transacted at any of the elevators above named.

10th. It is further mutually agreed that all line cars for shipments of grain out from the elevators are to have free access over the tracks of the party of the first part on as favorable terms as are granted them at the other elevators above mentioned; and, further, in case the said

party of the first part shall require additional storage exceeding said 1,000,000 bushels, or the amount that can be furnished by the said parties of the second part at both the elevators on the lots above described, to wit: the elevator now standing on lots one and two, in block K, and the one to be built, that the party of the first part shall give to the parties of the second part the option of furnishing such storage on the terms herein prescribed.

And it is further mutually agreed that said business of handling and storing said grain shall be done in the usual manner of transacting such business in the city of Chicago in all respects, and to the satisfaction of the superintendent of the party of the first part.

But in case the party of the first part shall in writing notify the parties of the second part that the first party requires additional storage, as above provided, and shall furnish the proper grounds therefor at an annual rental of seven per cent. per annum on an amount equal to the cost thereof, together with taxes and assessments, the parties of the second part shall decline or fail to furnish it within a reasonable time, the party of the first part may elect to terminate this contract on account of such failure, and in that event the party of the first part shall take the lots 1 and 2 of block K and the elevator now standing thereon, together with the elevator to be constructed on the lots hereby demised, in the manner and on the terms hereinafter provided, and on receiving payment as hereinafter provided, the second parties agree to make a conveyance of said lots 1 and 2 of block K and of the elevator standing thereon, and also the elevator to be constructed on lots 3, 4 and 5 of said block K, free and clear of all incumbrances to the party of the first part, and surrender possession thereof to it.

11th. It is further mutually agreed and understood that so much of lots 3, 4 and 5 of said block K as is not required for the uses, purposes and operation of the elevator to be constructed by the parties of the second part may be used by the party of the first part during the continuance of this contract for railroad tracks and other purposes connected with its business.

12th. It is further mutually agreed that at the expiration or sooner termination of this lease the said party of

the first part, unless by mutual consent the lease is renewed for an additional term, shall purchase the elevator now standing on lots 1 and 2, together with said lots, and also the elevator to be constructed on lots 3, 4 and 5, and also any additional elevator that may be built under the terms of this agreement, at their then value in cash; and if the parties hereto are unable to agree upon the price to be paid therefor, the same shall be fixed by arbitration as follows:

Each of the parties hereto shall appoint one arbitrator, and the persons so appointed shall elect a third, and the three persons so appointed shall examine said buildings and lots and determine the price to be paid by the said party of the first part to the parties of the second part therefor, and the award of the said arbitrators so made, or the majority of them, shall be binding on the parties hereto, and on payment thereof by the party of the first part to the parties of the second part a conveyance of the lots and possession of said buildings, together with all machinery and appurtenances, shall be forthwith delivered to the party of the first part.

13th. It is further mutually agreed and understood that as between the parties composing the parties of the second part, Jesse Hoyt & Company own three-fourths interest, and the said Perry H. Smith and George L. Dunlap together have one-fourth interest in this contract.

In witness whereof, the parties to these presents have hereunto put their names and seals the day and year first above written.

[SEAL.] THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

(Signed) ALEX. MITCHELL, *President.*

Attest: F. G. RANNEY, *Secretary pro tem.*

(Signed) JESSE HOYT. [SEAL.]

(Signed) ALFRED M. HOYT. [SEAL.]

(Signed) THEODORE I. HUSTED. [SEAL.]

(Signed) LEONARD HAZELTINE. [SEAL.]

(Signed) PERRY H. SMITH. [SEAL.]

(Signed) GEO. L. DUNLAP, [SEAL.]

By P. H. SMITH.

By way of supplement to the agreement dated February eighteenth, 1880, made between the Chicago, Mil-

waukee & St. Paul Railway Company, party of the first part, and Jesse Hoyt, Alfred M. Hoyt, Theodore I. Husted and Leonard Hazeltine, doing business under the firm name and style of Jesse Hoyt & Company, of the city of New York, and Perry H. Smith and George L. Dunlap, of the city of Chicago, parties of the second part—

It is hereby agreed between the parties hereto, and with like legal effect as if the provisions hereof were incorporated in said original agreement, as follows, viz:

First. Article one of said contract is hereby amended by adding at the end of said article the words "and the party of the first part further agrees to give possession of said lots to the parties of the second part on or before the first day of May, 1880."

Second. Article six of said contract is hereby amended by adding at the end of said article the words "excepting the same be occasioned by willful or wanton negligence of the said party of the first part."

Third. Article seven of said contract is hereby amended by inserting after the word "Sundays" the words "upon special request of the general manager of said party of the first part, and when such request is for Sunday work it shall be made on or before the Saturday previous."

CHICAGO, MILWAUKEE & ST. PAUL
[SEAL.] RAILWAY COMPANY,
(Signed) By ALEX. MITCHELL, *President.*
Attest: F. G. RANNEY, *Secretary pro Tem.*

| | | |
|---|---|---|
| (Signed) | JESSE HOYT. | [SEAL.] |
| (Signed) | ALFRED M. HOYT. | [SEAL.] |
| (Signed) | THEODORE I. HUSTED. | [SEAL.] |
| (Signed) | LEONARD HAZELTINE. | [SEAL.] |
| (Signed) | PERRY H. SMITH. | [SEAL.] |
| (Signed) | GEO. L. DUNLAP, | [SEAL.] |

By P. H. SMITH.

Second. That said elevator was constructed upon the lots named in said agreement and was completed within the time and in accordance with the terms and conditions of said agreement, on or about the 24th day of December, A. D. 1880, with a working capacity of 750,000 bushels; that the storage or working capacity of the

elevator known as the Fulton elevator was 350,000 bushels, both elevators affording storage and working capacity of about 1,100,000 bushels of grain, and that the cost of constructing said new elevator was about the sum of $200,000.

Third. That the said Munger, Wheeler & Company, as assignees of Jesse Hoyt and his associates, built said new elevator and have controlled and operated both elevators since December, 1880, and are now operating the same, and that said firm during said time also owned and controlled six other elevators, all located in the city of Chicago, upon other railroads entering into said city, and that at the present time said firm controls and operates in all eight grain elevators in said city, with an aggregate storage or working capacity of about 6,000,000 bushels of grain.

Fourth. That in the year 1886 the plaintiffs received from the defendant, for store in the St. Paul or new elevator, 1,923,339 bushels of grain, and in the Fulton elevator 903,482 bushels, and also that the plaintiffs received from the defendant for storage 432,985 bushels of grain in the Union elevator, located on the Chicago and Alton railroad, in the city of Chicago, making a total for the year 1886 of grain received by the plaintiffs from the defendant of 3,259,806 bushels, all of which is credited to the defendant in its account for that year.

That in the year 1887 the plaintiffs received from the defendant in the new or St. Paul elevator 2,300,292 bushels of grain, and in the Fulton elevator 657,300 bushels of grain, making a total of 2,950,592 bushels of grain received by the plaintiffs from the defendant during the year 1887.

That all the grain received and handled by the plaintiffs in the Fulton and St. Paul elevators during said years was received from the Chicago, Milwaukee and St. Paul Railway Company.

Fifth. The court further finds that the plaintiffs admitted in open court that during the years 1886 and 1887 grain was tendered by the defendant to the plaintiffs for storage, and that it could not be received for the reason that the plaintiffs' warehouses were filled; that the grain so tendered amounted to 8,685,269 bushels, and that

the plaintiffs never declined to receive shipments of grain from the defendant when such elevators had capacity to receive it within 1,000,000 bushels, and that when the plaintiffs refused to receive further grain for storage the defendant was notified that it occupied the entire capacity stipulated for in the contract at the time plaintiffs declined to receive the grain so tendered, to wit: 1,000,000 bushels.

Sixth. That for the year 1886 the defendant paid for switching grain to other elevators when the plaintiffs were unable and therefore refused to accept the same, the sum of $2,871, and in the year 1887 the sum of $9,962.35, and that the cost of train service for the defendant in delivering such grain to other elevators amounted to about the same sum.

That the defendant also, during said year, contracted with parties having grain stored in said elevators to remove the same in order to furnish more room for the defendant; that for the removal of 100,000 bushels the defendant paid the owners thereof $15,000, and that after such removal the plaintiffs refused to receive from the defendant for storage more than 40,000 bushels in place of the grain that had been so removed, for the reason that that amount of additional grain exhausted the storage and hauling capacity of said two elevators; that it was to the interest of the defendant to deliver all the gra n to the plaintiffs at said St. Paul and Fulton elevators during said years.

That during the two years in controversy the entire storage capacity of said elevators was constantly occupied by grain received from the defendant's cars, and, although the plaintiffs refused to receive additional grain tendered by the defendant during the same period, their refusal was always based upon the ground that their elevators were full and contained more than 1,000,000 bushels of grain received from the defendant.

That at *one* time during the said years 1886 and 1887 did the plaintiffs refuse to receive grain from the defendants for storage in said elevators when there was any unoccupied storage space in the same, and that some of the grain so delivered and stored during said years remained in said elevators so long that the plaintiffs were not able

to receive or handle for defendant during said years the amount of grain contemplated by the contract, or the full amount actually tendered by defendant, and that but for this unusual condition the plaintiffs would have received and stored all the grain tendered by the defendant.

*Seventh.* The court further finds that the plaintiffs' regular charges for storage of grain in said elevators during the years 1886 and 1887 were three-quarters of a cent per bushel for the first ten days, and one-half of a cent per bushel for the subsequent ten days, and for every thirty days the storage charges were one cent and three-quarters per bushel; that for 1,000,000 bushels stored in such elevators and continued therein for one year the regular storage charges for the same during the years 1886 and 1887 would be at the rate of $150,000 for each 1,000,000 bushels for the term of one year; that if said elevators could be kept employed with first storage—that is, if 1,000,000 bushels could pass through said elevators each ten days—the charges for a year would amount to about $270,000.

That the length of time that said grain remained in store was not regulated or controlled by either the plaintiffs or defendant, but by the shippers or owners of such grain.

*Eighth.* That the plaintiffs have kept the account of all their elevators together, and therefore could not state the earnings of the elevators in question for the years 1886 and 1887.

*Ninth.* There is no evidence of the amount of earnings of said St. Paul and Fulton elevators during the years 1886 and 1887, or of the income of the plaintiffs derived from the storage of grain or charges thereon in said elevators during said period of time, nor is there any evidence of any actual damages sustained by the plaintiffs by reason of their not handling in said elevators during said years the full amount of 10,000,000 bushels of grain or by reason of the alleged breach of covenant by the defendant other than the one cent per bushel for the years 1886 and 1887, as prescribed by article 8 of the contract.

And thereupon the defendant moved the court to enter

judgment in its favor upon said special findings of fact, which said motion the court denied; to which ruling of the court the defendant then and there duly excepted.

And thereupon the court found for the plaintiffs and rendered the following opinion in said cause:

On the 18th day of February, 1880, the defendant leased to the plaintiffs for a term of ten years from January 1, 1881, lots 1, 2, and 3, in block K of the original plat of the town of Chicago.

The plaintiffs agreed to erect on the lots during the year 1880 an elevator with storage capacity of 700,000 bushels, which they did, and to pay an annual ground rent of $3,850 and all taxes and assessments levied against the premises; furnish the defendant at all times during the term with storage capacity for at least one million bushels of grain in the elevator to be erected and in another elevator then owned by the plaintiffs and standing on lots 1 and 2 of the same block, having storage capacity of about 350,000 bushels.

The plaintiffs also agreed that if, in the ordinary course of their business, the capacity of the two elevators should enable them to do so, they would receive and store all the grain carried by the defendant to Chicago for consignment.

The eighth article of the contract reads as follows:

"In consideration of the agreement aforesaid, the said party of the first part (the defendant) agrees that the total amount of grain received at said elevators shall be at least five million bushels on an average for each year during the term of this lease; and in case it shall fall short of that amount the said party of the first part agrees to pay to the said party of the second part one cent per bushel on the amount of such deficiency, settlements to be made at the close of each year; and whenever it shall appear at the close of any year that the total of grain received during so much of the term of this lease as shall then have elapsed does not amount to an average of five million bushels for each year, the party of the first part shall pay to the party of the second part one cent per bushel for the amount of such deficiency; but in case it shall afterwards appear that the total amount received up to that time equals or exceeds the average amount of five

million bushels per annum the amount so paid to the party of the second part shall be refunded or so much thereof as the receipts of the year shall have exceeded five million bushels, so that the whole amount paid on account of deficiency shall be refunded should the total receipts for the entire term equal or exceed fifty million bushels in all, or an average of five million bushels for each year."

In 1886 the plaintiffs received from the defendant and stored in the two elevators 3,259.806 bushels of grain, and in 1887 they received and stored 2,957,592 bushels, the amount received during each of the two years less than 5,000 000 bushels being 1,740,191 and 2,042,408 bushels respectively.

During this period the entire storage capacity of the elevators was constantly occupied by grain received from the defendant's cars, and although the plaintiffs repeatedly refused to receive additional grain tendered by the defendant during the same period, their refusal was always based upon the ground that the elevators were full and contained more than one million bushels.

The plaintiffs insist that under the contract the defendant owes them one cent per bushel upon the deficiency of the receipts above shown, and demand judgment for that amount.

By the third article of the contract the defendant agreed that so far as it could legally control the same it would deliver to the plaintiffs for storage all the grain it carried to Chicago, and by the article quoted the defendant guaranteed that the plaintiffs could annually receive into the two elevators for storage at least five million bushels, and if during any year of the lease the plaintiffs should receive less than that amount, whether tendered or not by the defendant, it would pay the plaintiffs one cent per bushel on the difference between the amount actually received and five million bushels.

Under ordinary conditions the plaintiffs could, and would have received from the defendant and stored in the two elevators more than the guaranteed amount of grain.

One of the plaintiffs testified that in a single year he had received and stored in an elevator of less than one million bushels capacity, ten million bushels of grain.

The defendant knew that grain stored in the elevators would remain there until ordered out by the consignees, and that the ability of the plaintiffs to anuually receive five million bushels in elevators containing storage capacity of only one-fifth that amount would depend upon the action of the consignees.

It happened that during the years 1886, and 1887, the grain received into the elevators from the defendant's cars remained in store so long that the plaintiffs were unable to receive the full amount they were entitled to handle under the contract.

The parties contemplated that this might occur, and in their agreement provided for such a contingency.

In consideration of the premises of the plaintiffs, and the facilities to be furnished by them to the defendant for the storage of grain carried by the latter to Chicago, the defendant agreed, and bound itself to do certain things specified in the contract, one of which was, that if with a storage capacity of one million bushels the plaintiffs should not be able to receive and handle five million bushels annually, and earn commissions on that basis, the defendant would pay to the plaintiffs one cent per bushel on the deficiency.

If this is not what the parties intended, why was the word "receive" used as it appears in the eighth article?

The meaning of the contract is plain enough when it is interpreted in view of the situation of the parties and the known methods of receiving, storing, and handling grain in elevators at Chicago.

The court therefore finds that there is due the plaintiffs, from the defendant, for the deficiency in the year 1886, $17,401.94 and interest thereon from the 1st day of January, 1887, to September 25, 1889, $2,854.88, and for the year 1887 on account of such deficiency the sum of $20,-434.08, together with interest thereon from January 1, 1887, to September 25, 1889, $2,125.23, making a sum total on account of such deficiency and interest of $42,-806.13. The court further finds that there is due the defendants from plaintiffs, on account of ground rent for the year 1886, the sum of $3,850, payable in quarterly installments, together with interest thereon from maturity of each quarterly payment to September 25, 1889; also

for the year 1887, the ground rent and interest as for the year 1886, making a total of credits on account of ground rent and interest of $9,022.30, leaving a balance due from the defendant to plaintiffs of $33,783.83.

W. Q. GRESHAM."

The defendant by its counsel, entered its motion for a new trial, assigning the following causes, to wit:

*First.* The court erred in overruling the propositions of law requested by the defendant.

*Second.* The court erred in finding for the plaintiffs, and assessing their damages at the sum of $42,806.13, on account of the deficiency in the amount of grain received for storage and handling, from the defendant, in the years 1886 and 1887.

*Third.* The findings of fact do not support or tend to support the damages found by the court.

*Fourth.* The court erred in its construction of the contract between the plaintiffs and the defendant.

Motion for new trial was overruled, and judgment entered upon the findings.

## ASSIGNMENT OF ERRORS.

And the said Chicago, Milwaukee and St. Paul Railway Company, plaintiff in error, now comes and says that in the record and proceedings aforesaid, there is manifest error in this, to wit:

*First.* The court erred in overruling the requests and propositions of law submitted by the defendant at the time of the trial.

*Second.* The court erred in entering judgment for the plaintiffs and assessing their damages at the sum of $42,806.13, on account of the deficiency in amount of grain

received for storage and handling, from the defendant in the years 1886 and 1887.

*Third.* The judgment of the court is not sustained by its special findings of fact.

*Fourth.* The evidence and the facts, specially found by the court do not support or tend to support the judgment.

*Fifth.* The court erred in its construction of the contract between the plaintiffs and the defendant.

*Sixth.* The court erred in refusing defendants' motion for judgment in its favor upon the special findings of fact.

E. WALKER,
*Attorney for Plaintiffs in Error.*

## BRIEF AND ARGUMENT.

The principal question submitted to the court involves the construction of the contract between the parties.

Under the first article of the contract the plaintiff in error releases and demises to the defendant in error lots 3, 4 and 5 of block K of the original town of Chicago, for a term of ten years, from the 1st day of January, 1881, at an annual rental of $3,850, payable quarterly, together with taxes and assessments levied thereon.

Under the second article the defendant in error covenants to erect on said lots a grain elevator of 700,000 bushels capacity, and all modern improvements and appurtenances for receiving and discharging grain.

Article 3 of the lease provides that the railway company shall lay all necessary tracks connecting its railway with the elevators of the defendants in error, and also "deliver on said tracks in cars at said elevators, to the parties of the second part, all the grain that may be brought by its railway, consigned to parties in the city of Chicago, so far as the parties of the first part can legally control the same, for handling and storage in said elevators."

Article 4 provides that the defendants in error shall receive, handle and store grain in the usual manner of handling grain in the city of Chicago, to the extent of the capacity of said elevators so to be constructed, and, in addition, that they should use for the same purpose, so far as their other engagements should allow, the elevators now standing on lots 1 and 2, and the railway company should be entitled to storage for its grain to the extent of at least 1,000,000 bushels.

It is also provided, in the same article, that the defendants in error, with the consent of the railway company, might receive grain for storage from other parties; but in case the grain so received should reduce the capacity of the elevators to accommodate the railway company to the extent of 1,000,000 bushels, defendants in error covenant to furnish storage in other elevators to the extent of the capacity so reduced, free of switching charges.

Article 5 regulates the storage charges on said grain, limiting the rate to one and one-fourth cents per bushel for the first storage charge of ten days. There are many other covenants contained in this lease not essential to the consideration of the questions involved.

The defendant in error is only charged with a breach of the covenant contained in article 8. The essential part of this article now under consideration is as follows:

"In consideration of the agreements aforesaid, the said party of the first part agrees that the total amount of grain received at said elevators shall be at least five million bushels, average, for each year during the term of this lease, and in case it shall fall short of that amount the said party of the first part agrees to pay to said party of the second part one cent per bushel on the amount of such deficiency, settlement to be made at the close of each year; and whenever it shall appear at the close of any year that the total amount of grain received during that year does not amount to five million bushels, the parties of the first part shall pay to the parties of the second part one cent per bushel for the amount of such deficiency."

The declaration avers that the plaintiffs were at all times ready and willing to furnish grain storage for the use of the defendants to the amount agreed upon by them to be so furnished in said elevators; *i. e.*, "*to the amount* "*of one million bushels.*" The breaches assigned are in

substance that during the years 1886 and 1887 the defendants in error allowed the railway company the full storage capacity of one million bushels as stipulated in the indenture, but avers that the amount actually received in said elevators was less than five million bushels per year, such deficiency amounting to 3,789,602 bushels of grain, by reason of which the said defendant in error, according to the terms and provisions of said indenture and its covenant in such cases therein provided, "became and "was bound to pay to said plaintiffs on account of said "deficiency, one cent per bushel."

It is not charged that the defendant in error failed or refused to deliver at said elevators all the grain transported over its lines to the city of Chicago so far as said company could legally control the same, nor is it charged that the railway company refused to deliver, or tender for delivery, to said elevators for storage, ten million bushels of grain during the years 1886 and 1887, but on the contrary, the only breach assigned is that the stipulated quantity of grain was not annually *received* by the elevators for storage. The trial court in construing this article of the contract, held that the railway company covenanted that the defendants in error should receive at said elevators for storage five million bushels of grain per annum, and if they could not receive the full amount of such grain for storage, plaintiffs in error would still be liable for one cent per bushel for the amount of such deficiency—in other words, the court practically held that this was a covenant of guaranty on the part of the plaintiff in error; that defendants in error would so conduct their business that five million bushels of grain per annum could be received and handled in such elevators, and therefore, although the railway company during the

two years in controversy tendered nearly nine million bushels of grain more than defendants in error could or would receive, it was still liable in damages for breach of the covenant, one cent per bushel on nearly four million bushels of grain tendered to, but refused by, defendants in error.

## II.

### THE CONSTRUCTION OF THE CONTRACT.

*a.* In the construction of this contract we assume that the court will consider the subject-matter, the situation of the property, its use under the contract, and the intention and purpose of the parties in making the same. At the time the contract was entered into, both parties were engaged in a public employment as distinguished from ordinary pursuits, and both had public duties to perform. The plaintiffs were public warehousemen, owning the elevator for the storage of grain, located upon lots 1 and 2 of the original town of Chicago, while the defendant was the owner of lots 3, 4 and 5 of the same block, and common carriers of grain.

Under, and in accordance with the provisions of the contract, the plaintiffs constructed a grain elevator upon the defendant's property, with a capacity of about 700,000 bushels. As a common carrier the defendant was not the owner, and could not control the consignment of of grain, but, on the contrary, was required by the statute to deliver the grain at any elevator the consignor or the consignee might direct. The plaintiff's elevator, known as the Fulton elevator, standing upon lots 1 and 2, had been operated for many years by the plaintiffs as warehousemen, receiving grain for storage, and was

accessible not only to the defendant but to other railroads, terminating and doing business in the city of Chicago, and also by water transportation. The defendant, by side-tracks, connected these elevators with tracks in Canal street, used in common by the defendant, the Chicago and North-Western and other railroad companies.

In section 3 of the lease, the defendant covenanted to "deliver on said tracks, in cars, at said elevator to the "parties of the second part, all the grain that may be "brought by its railway consigned to parties in the city "of Chicago, so far as the defendant could legally con-"trol the same for handling and storage in said elevator."

To this extent the defendant could legally covenant, but beyond this it could not control the consignment of any grain received upon its line as a common carrier. The defendant is not charged with a breach of this covenant, nor is it claimed that during the year 1888, or at any other time, the defendant refused to deliver at said elevator any grain transported over its railway, the destination of which it could legally control. As a common carrier it was required by law to receive all grain tendered to it for transportation, and deliver it to any warehouse or elevator within the city of Chicago accessible to its lines. Practically, the law would require the defendant to deliver grain, by order of consignor or consignee, to any elevator within the city of Chicago, for the reason that, under the system now and then adopted, all the elevators are, and were, accessible to the several railways.

We have said that the business of both the plaintiffs and defendant was regulated by law. Section 1 of article 13 of the constitution of 1870, under the title of "Ware-"houses," provides that:

"All elevators or store-houses where grain or other property is stored for compensation, whether the property is kept separate or not, are declared to be public warehouses."

Section 5 provides that, "All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee or the elevator or public warehouse can be reached by any track owned, leased or used, or which can be used by such railroad company; and all railroad companies shall permit connections to be made with their tracks, so that any such consignee or any public warehouse, coal-bank or coal-yard, may be reached by the cars of said railroad."

And the business of receiving, delivering and carrying grain is regulated by the general statutes, approved April 25, 1871.

Section 1 of said statute provides that

"Every railroad corporation chartered by, or organized under the laws of this state, or doing business within the limits of the same, when desired by any person wishing to ship any grain over its road, shall receive and transport such grain in bulk within a reasonable time, and load the same either upon its track, at its depot, or at any warehouse adjoining its track, or side-track, without distinction, discrimination or favor between one shipper and another, and without distinction or discrimination as to the manner in which such grain is offered to it for transportation, or as to the person, warehouse or place to whom, or to which it may be consigned."

It is also provided by section 6 of the act regulating public warehouses, that it shall be the duty of every warehouseman to receive for storage any grain that may be tendered to him in the usual manner in which warehousemen are accustomed to receive the same in the ordinary course of business, not making any discrimination between persons desiring to avail themselves of warehouse facilities.

It appears, therefore, that both railways and warehousemen are expressly prohibited by statute from discrimination not only as to transportation, but also as to the storage and handling of grain. Whatever may have been the contract between the parties, the railway company was required to transport and deliver grain as directed by the consignor, and the plaintiffs were required to receive all grains consigned to either elevator in block K, and could not lawfully refuse storage facilities by reason of any contract between themselves and the defendant.

The elevator erected by the plaintiffs on block K was a public warehouse, and as such, any consignor or consignee of grain over any railway track accessible to such warehouse would be entitled to storage facilities, and any contract by the plaintiffs for the exclusive use of such warehouse by the defendant, to the exclusion of other shippers, over other railways accessible to such warehouses, would be invalid, and in violation of the statutes referred to. Whatever may be the terms of such contract, we contend, that notwithstanding the plaintiff's covenant to grant the defendant the exclusive privilege of storing grain transported over its railway to the exclusion of other railways accessible to the same elevator, such covenant would be void as against the express provisions of the statutes governing all railways, and all public warehouses, within the state. Judicial construction of the constitution and the statutes of our state regulating railways and public warehouses, was given in the case of *Munn* v. *State of Illinois*, 94 U. S. Reports, 113.

It is true that the railway company has not covenanted to deliver at such elevator any grain consigned to parties in the city of Chicago, except so far as it could legally control the same; but in section 4 the plaintiffs covenant

to handle and store all grain transported by the railway company to the full extent of the capacity of the elevator to be constructed, evidently to the exclusion of grain transported by other railways that are accessible to such elevators, and to this extent such contract is vicious and illegal.

In *Chicago & North-Western Railway* v. *The People*, 56 Ill., 365, the duty of railways as carriers of grain is considered at length. In this case the railway company had entered into contract to deliver all grain received for transportation in the city of Chicago at certain elevators, and refused to deliver grain at the elevator to which it was consigned. In that case the court held that such contract, involving the principle of discrimination was in conflict with the duties the company owed the public as a common carrier; that the contract was vicious and could not be enforced.

The court further holds that "the company may make "such rules and contracts as it pleases, not inconsistent "with its duties as a common carrier, but it can go no "further." The same principle applies to the duties and contracts of public warehousemen; they occupy a position similar to common carriers, and must receive for storage, without discrimination, all grain tendered them by carriers or the public.

*Ross* v. *Johnson*, 5 Burr., 227.
*Steinman* v. *Wilkin*, 7th Watts & S. (Pa.), 456.
*Low* v. *Martin*, 18 Ill., 288.
Story on Bailments, Sec. 453.

While defendants in error do not claim that the plaintiff in error is guilty of a breach of either of the covenants

referred to, yet, in the consideration of the rights, duties and obligations of the parties under section 8 of the contract, these preceding sections should be carefully considered. The first paragraph of such section provides that "in consideration of the agreements of the parties "aforesaid, the said party of the first part agrees that the "total amount of grain received at said elevators shall be "at least five million of bushels on an average for each "year during the term of the lease." No other consideration is expressed or claimed, and it therefore follows, that if the agreements preceding section 8 conferred no special benefit, defendants in error's obligation in said section is wholly without consideration.

*b.* Section 8 is an independent contract between the parties, intended to be a guarantee of the amount of grain that should be received at such elevator for storage annually, and imposes upon the plaintiff in error a penalty in case the full amount of the grain provided in the contract shall not be annually received at such elevator for storage. In the construction of the agreements contained in this section, the damages can be assessed without reference to any other provisions of the lease. The defendants in error claim that the total amount of grain received at said elevators for the years 1886-7 was less than the stipulated amount of 5,000,000 bushels per annum, by reason of which the defendant, "according to the terms of the in-"denture aforesaid, became, and was called upon at the "close of said year, to pay the plaintiffs on said deficiency "one cent per bushel."

In this section the defendant does not undertake or agree to *deliver* annually 5,000,000 bushels of grain at said elevators, but, on the contrary, that there shall be *received* at said elevators at least 5,000,000 of bushels. In

section 4, the plaintiffs reserve the right " to receive grain " for storage from other parties, and from river and canal " craft, but covenant that in case such grain is so received " so as to reduce the capacity of the parties of the second " part to accommodate the party of the first part to the " extent of 1,000,000 of bushels in said elevators, the said " parties of the second part agree to furnish storage in " other elevators, to the party of the first part, to the ex- " tent that their capacity is so reduced, without expense " to the party of the first part for switching or other- " wise."

The grain that the defendant undertook to deliver, is defined in section 3 of the agreement, and limits the amount to " all the grain that may be brought by its rail- " way consigned to parties in the city of Chicago, so far " as the party of the first part can legally control the same " for handling and storage in said elevators."

These are all separate agreements or covenants, no one of which is dependent upon the other. Apparently section 8 is nothing more than an agreement upon the part of the defendant, that the amount of grain handled in said elevator shall not be less than 5,000,000 bushels per annum, and in case the grain so received is less than the stipulated amount, the same section undertakes to provide the plaintiff's measure of damages.

The author of Parsons on Contracts, second volume, seventh edition, section 4, page 517, on " Entirety of Contracts," says:

" If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be serviceable."

This rule is approved in *Lucesco Oil Co.* v. *Brewer et al.*, 66 Pa. St., 354.

It is also well illustrated by the case of *Johnson* v. *Johnson*, 3 B. & P. 162; also *Robinson* v. *Green*, 3 Met., 159.

It, therefore, follows that if section 8 is an independent contract between the parties, it must, of necessity, contain all the requisites of a valid contract, else it cannot be enforced against either party. There must be a good consideration for the promise or agreement of the defendant. The rule is elementary.

In *McLean* v. *McBean*, 74 Ill., 134, it is held to be essential to every contract or promise that it be founded on a good consideration. If the promise upon which the action is brought is without consideration, it would be void and no action could be maintained upon it. 2 Parsons, page 528, further says that "covenants or agree-" ments may be wholly independent, although relating to " the same subject, and made by the same parties, and " included in the same instrument. In that case there " are two separate contracts."

The consideration may be good if appreciable or beneficial. The only consideration for the agreement upon the part of the defendant is expressed to be " in consid-" eration of the agreement aforesaid." We have already shown that the defendant can derive no special benefit under this section, or any other section of the contract unless it be from the payment of the rental, and this can only be held to be a consideration for the lease executed by the defendant. The elevator was built in the interests of the plaintiffs themselves, was owned and operated by them, and the right of user and occupancy remained

wholly in them, nor does the defendant acquire any exclusive privileges over any other carrier, by railway or water, or as against the public generally. The law required of the defendants when this public elevator was constructed and its use thrown open to the public, to treat all alike, and without discrimination of any kind or character. If it was the intention of the parties to give exclusive privileges to the defendant, the contract could not be enforced in its favor, for the reason that such a contract would be obnoxious to the constitution and statutes of our state. Therefore, the agreements of the parties contained in the contract preceding section 8 are not beneficial to the defendant, and cannot be held to be a legal consideration for its agreement that the amount received at such elevator for storage should be $5,000,000 of bushels per annum.

*c.* Another essential element to the validity of a contract is mutuality. The law is tersely stated in Bishop on Contracts, section 77, as follows: "A promise by one "with nothing in return is void," and section 78:

"Both must be bound or neither. * * * Unless both are bound so that an action could be maintained by either against the other upon a breach, neither will be bound. *Stiles* v. *McClelland*, 6 Colo., 89; *Townshend* v. *Fisher*, 2 Hilton, 42; *Ewins* v. *Gordon*, 49 N. H., 444. This proposition is absolutely axiomatic, not admitting of being overthrown by authorities, so long as the law requires something of value as a consideration; for where it is admitted that there is nothing for A's promise to rest on but B's promise, if B has not promised, A's promise rests on nothing, and is void. There may be cases in seeming contradiction to this; if there are any really so, they are not to be followed."

The defendant is not charged with any default or failure of performance, except as to the agreements contained in

section 8. The declaration does not charge that the defendant agreed to deliver at the elevators five million bushels of grain annually, but, on the contrary, it is charged that the agreement is, that the elevator should receive from any and all sources that amount of grain per annum; nor is it charged in the declaration that the plaintiffs on their part agreed to receive, store and handle five million bushels of grain delivered by the defendants or other parties, but, on the contrary, assert that their obligation was to receive from the defendant not exceeding one million bushels per annum. Plaintiffs' covenant to receive the one million bushels is not contained in section 8, but in section 4 of the contract. In that section the plaintiffs had covenanted to furnish the defendant storage capacity to the extent of one million bushels per annum, but did not in that, or any other section of the contract agree to furnish storage beyond that amount. They aver performance upon their part as follows:

1st. That they entered into possession of lots 3, 4 and 5 of block K; have ever since been in possession of the same; that they have paid the defendant the rental stipulated in said indenture, and all taxes and assessments levied thereon.

2d. That during the year 1880 they erected upon said lots a grain elevator of the capacity of 700,000 bushels in accordance with the terms of the indenture.

3d. That from the time when said grain elevator was completed ready for business, they furnished therein and in the elevators standing on lots 1 and 2, and "at all times "were willing and ready to furnish grain storage for the "use of defendant to the amount agreed by them to be "so furnished in said two elevators, that is to say, to the "*amount of one million bushels.*" (Rec., 14.)

It follows, therefore, that the construction put upon the contract by the plaintiffs is, that they are only required to furnish storage capacity to the extent of one million bushels per annum, but that the defendant has covenanted that there shall be received at such elevators for storage, five million bushels per annum. The plaintiffs do not aver a readiness to receive the five million bushels, but, on the contrary, insist that by the terms of the contract the receipt of one million bushels is a full performance of their covenant, and that they can lawfully refuse to receive the remaining four million bushels, and at the same time recover of the defendant at the rate of one cent per bushel per annum on the grain they thus refuse to receive. It will be remembered that the defendant has no charge or control of the grain, except while it is in its possession as a common carrier; that when it passes from the defendant's cars to the elevator, the defendant has no further direction in the matter. The owner of the grain can leave it in store in such elevators any length of time he may elect, or the plaintiffs, the owners of the elevator, may become the owners of all the grain first delivered therein, and retain the same in such elevators during the entire term of the lease. Under plaintiffs' construction, if one million bushels of grain is received in such elevators from the defendant's railway, that grain may be held in said elevators during the entire term of the lease, and the defendant be compelled to pay them a bonus of forty thousand dollars ($40,000) per annum.

There is, therefore, presented the clean, naked proposition of law, whether such a contract can be enforced; whether such a contract is not absolutely void for want of mutuality.

In Chitty on Contracts, 5th Am. Ed., 15, the author says:

"The assent or consent must be mutual, although the defendant's promise be in itself positive and unambiguous. * * * The agreement, as before observed, must in general be obligatory on both parties or it will bind neither."

*Kingston* v. *Phelps*, Pake 227.
*Biddle* v. *Douse*, 6 B. & C., 255.

"There are several cases satisfactorily establishing that "if the one party never was bound on his part to do the "act which forms the consideration for the promise of the "other, the agreement is void for want of mutuality. "Thus in a case in which it was attempted to charge a "defendant upon an award, Lord Kenyon held 'that it "was necessary to prove that the plaintiff had also agreed "to be bound by the award,' observing that there was "otherwise no mutuality, and therefore his agreement was "a mere *nudum pactum*, and not binding upon him. * * "* So a written agreement 'to remain with A. B. two "years for the purpose of learning a trade is not binding "for want of reciprocity, namely, an engagement in the "same instrument by A. B. to teach.' If necessary to "prove plaintiffs' agreement, as held by Lord Kenyon, "then it follows the necessary averment should be made "in the declaration."

Addison on Contracts, page 14, says:

"The mutuality of contracts is the very essence of all "contracts founded upon mutual promises." "Hence it "follows," observes Pothier, "that nothing can be more "contradictory to such an obligation than an entire lib-"erty in either of the parties making the promise, to "perform it or not, as he may please. An agreement

"giving such a liberty would be void for want of obliga-
"tion, *i. e.*, so long as the contract remained wholly
"executory, and nothing has been done under it."

In *Utica & Schenectady R. R. Co.* v. *Brinkerhoff*, 34 Am. Dec., 220 (21 Wend., 119) it is held that mutual promises must be concurrent and obligatory at the same time to render either binding, and must be so stated in the declaration.

"Declaration setting out no promise by plaintiff as a consideration for the defendant's promise is fatally defective on demurrer; as where a declaration by a railroad company sets out a written agreement with the defendant, stipulating that if the company would locate their road in a certain place, the defendant in consideration of benefits accruing to him therefrom would pay the value of certain lands required for such location, and that afterwards, on the same day, in consideration of such agreement, and that the plaintiffs at the defendant's request promised to perform the agreement on their part, the defendant undertook and promised to perform it on his part, an alleged performance by the plaintiffs and non-performance by the defendant." Citing *Burnet* v. *Bisco*, 4 John., 235; *Comstock* v. *Smith*, 7 John., 87; *DeZing* v. *Bailey*, 9 Wend., 336.

*Dorsey* v. *Packwood*, 12 How., 126, was an action on an agreement whereby the purchaser of a plantation bound himself to transfer to his son-in-law one-half of the plantation, slaves, cattle and stock, as soon as the son-in-law could pay for one-half of the cost of said property, either with his own private means or with one-half of the profits of the plantation. Held, that the contract was void for want of mutuality. The son-in-law was not bound to render any service nor pay any money. It was a *nudum pactum*.

On page 136, Mr. Justice GRIER, speaking for the court, says:

"The contract is signed by both parties in the presence of attesting witnesses; and is expressed in clear and precise terms, but there is one characteristic necessary to give it validity as a binding contract, in which it is entirely deficient. It wants mutuality. It imposes no obligation on Dorsey whatever. He is not bound either to render service or pay money as a consideration for one-half the land. Packwood cannot support his suit upon it to compel Dorsey to do anything. It is not an alternative obligation, because Dorsey is not bound to perform either alternative."

In *Pullman Palace Car Co.* v. *Texas & Pacific R. Co.*, 11 Fed. Rep., 625, the plaintiff prayed an injunction and a decree for specific performance of contract. The court held that "no decree should be entered or order allowed for "the specific performance of the contract where there is "not a mutuality of remedy between the parties, obtain-"able from the court."

*Marble Company* v. *Ripley*, 10 Wallace, 339, was a bill in chancery to enforce specifically, certain covenants contained in a contract between the parties. The court denied the relief for want of mutuality.

On page 359 the court holds:

"That is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other."

Direct application of these principles should be made in the case at bar. The plaintiff in error could not enforce specific performance of the covenants contained in section 8, against the defendant in error—the defendant in error did not contract to receive five million bushels of grain, or any other amount, in the section referred to. Under the construction claimed by the defendant in error, their covenant to receive is limited to the amount of one

million bushels per annum. It is not possible, therefore, for them to enforce their claim of damages against the plaintiff in error for its failure to deliver five million bushels per annum. The defendants in error do not claim, nor do they aver in their declaration, that they were ready and willing to receive any amount beyond the amount of their liability, that is, one million bushels of grain.

In *Chambers* v. *Smith*, 30 Ala., 336, it is held that mutuality is necessary to a valid contract. An agreement between the purchaser of a tract of land and another person who is prevented, by want of means, from making the purchase, to the effect that the latter may have the land if he can and will pay for it, imposes no obligation on the latter to take the land, and, consequently does not amount to a contract, for want of the requisite mutuality.

As there is no covenant in section 8, or in any other section of the contract, that the defendants in error shall receive and store 5,000,000 bushels of grain, if tendered, the contract is void for want of the requisite mutuality.

In *Olney, Admx.*, v. *Howe*, 89 Ill., 560, the rule is stated as follows:

"To make it a valid executory contract, both parties must have been bound thereby. The promise of each party is concurrent and obligatory on both, at the same time, to render the promise of either binding." 1 Chitty, 297; *Tucker* v. *Wood*, 12 Johns., 190. This court said, in *McKinley* v. *Watkins*, 13 Ill., 142: "Unless the plaintiff were bound, on his part, not to do the act which formed the consideration of the promise of the defendant, the agreement was void for want of mutuality."

Also in *Weaver et al.* v. *Weaver*, 109 Ill., 233, the court says:

"It is a rule of general application in law of contracts

that a contract between parties *sui juris* must be mutual. That is, if either is bound, both will be bound."

If the court shall hold that the agreement of the parties is not wholly void for want of mutuality, but only voidable, then we insist that the agreement of the plaintiff in error to deliver and the defendants in error to receive the five million bushels of grain, are dependent undertakings; that the obligation to deliver and the obligation to receive are concurrent; that it was wholly impossible for the plaintiff in error to deliver the five million bushels of grain unless the same was received by the defendants in error for storage, and that in order to recover for non-delivery, the plaintiffs must aver their readiness to receive the grain at the time alleged, and that the declaration must necessarily contain such an averment.

In *Noonan* v. *Bradley*, 9 Wallace, U. S. Rep., 394, the court enforces this rule as to the construction of the agreement which was the foundation of the action:

"If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should be adopted which would be to the advantage of the defendant, upon the general ground that a party who takes an agreement prepared by another, and upon its faith incurs obligations, or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground *that when an instrument is susceptible of two constructions —the one working injustice, and the other consistent with the right of the case—that one should be favored which standeth with the right.*" And cites *Meyer* v. *Isaac*, 6 Meeson and Welsby, 612.

*d.* Section 8 of the contract may also be held to be void for impossibility of performance. It may be held that it was possible for the plaintiff in error to tender the full amount of five million bushels of grain, but certainly it could not compel the defendants in error to receive it. Under no section of

the entire contract can the plaintiff in error require, or demand, that the defendants in error should receive more than one million bushels per annum, and therefore it follows that it was impossible for the railway company to deliver the remaining four million bushels. The rule in Parsons on Contracts, volume 2, page 673, is that "if one "promises to do what cannot be done, and the impos- "sibility is not only certain but perfectly obvious to the "promisee, a contract would be void for its inherent ad- "surdity."

Also Pollock's Principles of Contracts, 350:

"If the performance of any promise becomes impossible in fact by the default of the promisee, the promisor is discharged." The writer supports the rule as follows: "On the first and simplest rule—that the agreement, impossible in itself, is void—there is little or no direct authority, for the plain reasons that such agreements do not occur in practice; but it is always assumed to be so."

In the case on hearing it appears that the plaintiff in error was not only ready and willing, but repeatedly offered to perform all its covenants, but was prevented from so doing by the condition of the elevators of the defendants in error, over which the railway company had no control whatever. By reason of the failure or refusal of the defendants in error to receive the grain tendered, the railway company was damaged to the amount of several thousand dollars, and is now subjected to a penalty of over thirty thousand dollars for an alleged failure to perform an agreement impossible of performance, or beyond the control of plaintiff in error.

Article 8 of the contract has received the consideration of the Appellate court of the State of Illinois. Action was brought upon the same agreement, for an alleged deficiency for the year 1888, and the breaches assigned

were precisely the same as in the case at bar, except in amounts.

The court overruled the defendants' demurrer to the declaration, the defendants stood by the demurrer, judgment was entered, and appeal allowed. The court speaking by Judge GARY, say:

"The declaration contains averments that the appellees have kept and performed all the covenants on their part, and at all times were willing and ready to furnish storage for the company to the amount of 1,000,000 bushels; but there is no special averment that they were ready and willing to do what the covenant on which the breach is assigned implies that they were to do, to make performance of that covenant by the company possible. * * *

The averment that the appellees had kept and performed all the covenants on their part, and at all times were willing to furnish storage for the company to the amount of 1,000,000 bushels, is not an averment, or the equivalent to an averment that, they were at all times willing and ready to furnish the storage that might be necessary for a business of 5,000,000 of bushels in a year. There is no judicial knowledge of the course of business, or of the relation, or ratio, of 1,000,000 at one time to 5,000,000 in a year. The company would be in no default unless the appellees would receive the grain when brought, and as the acts of delivery and receipt were to be mutual, an averment of readiness by the appellees is necessaay. 1 Chitty's Pleadings, 336."

37 App. Ct. Rep. (Ill.), 64.

The cause was remanded, the declaration amended, and again a demurrer interposed.

On the second appeal, the Appellate court again reversed the judgment, holding that the defects in the declaration were not cured by the amendments.

The court said:

"But readiness to receive the 5,000,000 bushels, either on an average, or in any one year, is not alleged. True,

they aver that they were 'ready and willing to furnish the storage for grain to the defendant, that was so as aforesaid required to be furnished to it by them in said two elevators.' That, however, was but 1,000,000 bushels under covenant 4. * * * The extent of the obligation of the appellant itself to deliver, is measured by covenant 3. If all the grain from all sources that came to the elevators was 5,000,000, then, though not a bushel was bought by appellant, covenant 8 was performed. And if 10,000,000 came from other sources, and the appellant had not performed under covenant 3, it would have been liable for a breach of that covenant."

We do not cite the judgment of the Appellate court as an authority in this case, yet it is a court having jurisdiction over the cause submitted, in many cases of exclusive appellate jurisdiction, and the opinion was written by a judge of great ability and long experience upon the bench.

## III.

### THE CONTRACT OR AGREEMENT OF PLAINTIFF IN ERROR IN SECTION 8 IS ULTRA VIRES.

This railway company, like other railways, is a common carrier, and the contract, taken as an entirety, refers especially to the plaintiff in error as a common carrier of grain. It is a *quasi public* corporation, and as such is subject to certain provisions of the constitution and the statutes of our state, under which the state itself exercises over such corporations, and the business pertaining thereto, general control for the protection of the interests of the public. It is a mere creature of the law, possesses none of the elements of sovereignty, and cannot go beyond the powers granted. It has also implied authority, requisite and necessary to carry out and effectuate the

plans and purposes of the company. It is a general rule that when a corporation in its contracts goes beyond its expressed and implied powers, such contracts are *ultra vires* and void.

The question is directly presented in *Pearce* v. *Madison, etc., Railroad*, 21 How., 441. In that case suit was brought upon notes given by the president of the company, confirmed by an unauthorized consolidation. A demurrer to the declaration was sustained from which an appeal was prosecuted to the Supreme court. The judgment of the Circuit court was affirmed, the Supreme court saying:

"The only question is: Had the corporation the capacity to make the contract in the fulfillment of which the notes were executed?"

The opinion of the court is that it was a departure from the business of the corporation, and that its officers had exceeded their authority.

"The general rule is that corporations can exercise only such powers as are expressly conferred on them, and such implied powers as are necessary to enable them to perform their prescribed duties."

*Vandall* v. *San Francisco Dock Co.*, 40 Cal., 83.

*Bellmeyer* v. *Independent Dist. of Marshalltown*, 44 Ia., 581.

GRAY, C. J., in *Davis* v. *Old Colony R. R. Co.*, 131 Mass., 258, carefully reviews the authorities, and concisely states the principles and distinctions which underlie the question of corporate power. The action was brought upon an agreement signed by the Old Colony Railroad Company in the sum of $6,000, and by the Smith American Organ Company, in the sum of $5,000, and by other

corporations, amounting in the aggregate to more than $200,000. The agreement was as follows:

"Boston, January 23, 1872. We, the undersigned subscribers, hereby agree, each with the other, that we will contribute towards any deficiency (should there be one) that may arise towards defraying the expenses of the 'World's Peace Jubilee and International Musical Festival' to be held in Boston, commencing on the 17th of June, and closing on the 4th of July next, in such proportions as the amounts affixed to our several names bear to the whole amount subscribed, provided that no subscription shall be binding until the whole amount subscribed shall reach the sum of two hundred thousand dollars, and that no expenditure be incurred except under the authority of the executive committee, which committee shall represent the subscribers, and consist of ten or more persons, who may be chosen by the first six subscribers hereto."

The only question presented was, whether it was within the power of the defendant corporation to bind itself by such an agreement, and upon full consideration, the court held that the agreement was *ultra vires*, and that, therefore, no action could be maintained upon it against either defendant. The court says:

"A corporation has such power to do such business only, as it is authorized by its acts of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation, in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder will restrain the corporation from carrying out the contract; and a

court of common law will sustain no action on the contract against the corporation. Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the secretary of the commonwealth a certificate showing the purpose for which the corporation is constituted."

The court also cites, with approval, *East Anglican Railways* v. *Eastern Counties Railway*, 11 C. B., 775, where it was held that no action could be maintained by one railway company against another, upon the agreement made by the latter to take a lease of the railway of the first company, and to pay the expenses incurred by that company in the soliciting and promoting of bills in Parliament for the extension and improvement of that railway, even if the object and effect of the agreement were to increase the profits of the defendant's railway. Chief Justice JERVIS, in delivering the judgment, said:

"This act is a public act, accessible to all, and supposed to be known to all; and the plaintiffs must, therefore, be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be. It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act; and that their funds can only be applied for the purposes directed and provided for by the statute. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their acts; but it is said that they may embark in other undertakings, however various, provided the object of the directors be to increase the profits of their own railway. This, in truth, is the same proposition in another form; for if the company cannot carry on a new trade, merely because it was not contemplated by the act, they cannot embark in other undertakings not sanctioned by their act, merely

because they hope the speculation may ultimately increase the profits of the shareholder. They cannot engage in a new trade, because they are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. * * * Every proprietor when he takes shares, has a right to expect that the conditions upon which the act was obtained will be performed; and it is no sufficient answer to a shareholder, expecting his dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public also, has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired if the money supposed to be necessary, and destined by Parliament for the maintenance of the railway, be expended in other undertakings not contemplated when the act was obtained, and not expressly sanctioned by the Legislature. If the contract is illegal, as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissentient shareholders; for if the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds."

Mr. Chief Justice GRAY further said that "the holding of a World's Peace Jubilee and International Musical Festival is an enterprise wholly outside the object for which a railroad corporation is established; and a contract to pay, or to guarantee the payment of the expenses of such an enterprise is neither a necessary nor an appropriate means of carrying on the business of the railroad corporation, is an application of its funds to an object unauthorized and impliedly prohibited by its charter, and is beyond its corporate powers. Such a contract cannot be held to bind the corporation, by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in, or guarantee the success of the enterprise that might attract population or travel to any city or town upon or near its line."

Applying these principles to the case at bar, how can the guarantee of the plaintiff in error be sustained? The duties of a common carrier, and of a public warehouseman, are distinctly different. Under the statutes of our state it will hardly be held that a railroad corporation can operate a public warehouse. The business of the plaintiff in error is that of a common carrier of grain, and has no express or implied power to construct and operate a public warehouse for the storage of grain. It cannot lawfully enter into the business of buying and selling grain, nor can it prosecute a business for the handling or storing of grain. The legislature regulates the business of each, and the courts enforce the statutes imposing limitations upon the exercise of the powers conferred by the legislature upon railroad corporations, as well as upon public warehousemen. Section 8 is simply a guaranty that the income derived from the elevators upon block K shall not be less than $50,000 per annum. Defendants in error claim that under this guaranty the plaintiff in error is liable for the deficiency of the amount of grain stipulated in Section 8, amounting to the sum of $31,165.25. and for this amount judgment was entered by the trial court. The officers of the company executed the contract, but the corporation denies the validity of such contract, and declares that it is *ultra vires* and void.

In *Thomas* v. *Railroad Company*, 101 U. S. Rep., 71, Mr. Justice MILLER, speaking for the court, says, that the broad doctrine is established "that a contract not within "the scope of the powers conferred on the corporation "cannot be made valid by the assent of every one of the "shareholders, nor can it, by any partial performance, be-"come the foundation of a right of action"; and further says that this is the decided preponderance of authority,

both in this country and in England, and is based upon sound principle. The court further said: "There is, "another principle of equal importance and equally con- "clusive against the validity of this contract, which, if "not coming exactly within the doctrine of *ultra vires*, as "we have just discussed it, shows very clearly that the "railroad company was without the power to make such "a contract."

In *Pearce* v. *Madison, &c., R. R. Co.*, 21 How., *supra*, the court cites with approval, *Coleman* v. *Eastern Counties Railway*, 10 Beav., and the opinion of Lord Langdale. This was a suit brought by a shareholder to restrain the corporation from using its funds to establish a steam communication between the terminus of the road and the northern ports of Europe. The directors of the company vindicated the appropriation as beneficial to the company, and that similar arrangements were not unusual among railway companies, but Lord LANGDALE said:

"Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made. But I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted, that railway companies have no right to enter into new trades or business not pointed out by the acts. But it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided that the object of the liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind."

The general rule is that where officers of a corporation entered into contracts for the promotion of any business that is a departure from the business of a corporation,

such contracts are in excess of the authority of the officers, and are *ultra vires.*

In *Parish* v. *Wheeler*, 22 N. Y., 494, it was held: "That contracts with corporations made in excess of their powers, which are purely executory on both sides, and while no wrong would have been done if the parties had been left in their previous situation, should not be enforced, because such contracts contemplated an unauthorized conversion of frauds, and, therefore, a breach of a private trust."

Also in the case of *Whitney Arms Company* v. *Barlow*, 63 N. Y., 62, it is held that "when acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created."

*Downing* v. *Mount Washington Road Company*, 40 N. H., 230, was an action brought by Lewis Downing & Sons to recover the price of eight omnibuses, one old wagon, etc., made for the defendants under contract entered into by D. O. Macomber, president of the defendant corporation. The defendants denied the authority of Macomber to make such contract in behalf of the corporation, and the power of the corporation under its charter either to authorize, or enter into such a contract. The court held that this contract was beyond the powers of the corporation, that it was not incident to, or connected with its business, and was, therefore, void. It was claimed in this case that the contract had been partially executed, and that a ratification of part, is a ratification of the whole of the contract. The court, however, says while the corporation may be restricted from ratify-

ing a contract beyond the scope of the charter of the corporation, there could be no such objection to any matter clearly within their power, and that the contract so far as it was within the powers of the corporation should be treated as a valid contract. Especially is this the rule where the contract is severable, as in the present case.

The same rule has been adopted by our Supreme court in the case of *Bradley* v. *Ballard*, 55 Ill., 413. This was a bill in chancery brought by Bradley against Ballard and others, for the purpose of enjoining the prosecution of a suit pending in the Circuit court of Cook county, against a corporation called "The North Star "Gold and Silver Mining Company," in which complainant was a stockholder, upon certain promissory notes given by said company, and also to cancel certain other notes not yet in suit. The court sustained a demurrer to the bill, and, the complainant not asking to amend, a decree of dismissal was entered. In this, however, the company had power to borrow money, and the notes were given for loans—the court held that the company having received and enjoyed the fruits of the contract, a stockholder cannot enjoin the collection of the obligations. The court says:

"It is not correct to say, that the application to corporations of the doctrine of equitable estoppel, where justice requires it to be applied, as when, under a claim of corporate power, they have received benefits for which they refuse to pay, from a sudden discovery that they had not the powers they had claimed, can be made the means of enabling them indefinitely to extend their powers. * * * But while a contract remains executory, it is perfectly true that the powers of corporations cannot be extended beyond their proper limits for the purpose of enforcing a contract. Not only so, but on the application of a stockholder, or of any other person authorized to

make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. So, too, if a contract *ultra vires* is made between a corporation and another person, and while it is yet wholly unexecuted, the corporation recedes, the other contracting party would probably have no claim for damages. Take, for example, the case of a corporation chartered to build a railway from Chicago to Rock Island. Under such a charter the company would have no power to build steamboats, for the purpose of running a line of such vessels between Rock Island and St. Louis. But suppose the company, notwithstanding the want of power, should make a contract for the building of a vessel, and it is built by the contractor, and accepted and used by the railway. Could any court permit the corporation, when sued for the value of the vessel, to excuse itself from payment, on the ground that, although it has and uses the steamer, it had no authority to do so by its charter? * * * In cases of such character, courts simply say to corporations, you cannot in this case raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing have placed in your corporate treasury the fruits of others' labor, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter."

In the case at bar, however, the railway company has received no property, or fruits of property, from the defendant in error, nor has the company received any special benefits under the contract. It receives the rental of the ground, but beyond this enjoys no special benefits. The title to the elevator is vested in the defendants in error, and they have the right to enjoy the use and occupation of the entire property during the term of lease. The plaintiff in error has acquired no additional property rights, nor can it under the contract acquire any further property interests except upon full payment of the valuation of the new elevator, and also lots 1 and 2, and the elevator built thereon. So far as appears from the con-

tract, and the averments contained in the declaration, the defendants in error have enjoyed all the substantial benefits growing out of such contract, and therefore the case cannot be taken out of the general rule of the invalidity of contracts that are *ultra vires*.

Let us illustrate our position by another hypothetical case. Supposing the railway company, for the purpose of increasing its traffic and the revenues of the company, should enter into a contract with one of the wholesale merchants of our city for the location of a branch house at Rock Island, and, as an inducement, should agree that, if such firm would covenant to ship all its freight over the company's line to Rock Island, that in consideration thereof, the company, upon its part, covenanted that the income of such business should not be less than $50,000 a year, and, if less, the company would make good the deficiency. Could it be held that, if the merchant performed his part of the agreement, established such agency, transported his goods over the company's line to Rock Island, conducted his business as provided in the contract for one year, and at the end of the year should show a deficiency of $25,000, that in an action brought against the company to recover such deficiency, such contract was not *ultra vires?* In the case at bar, if the defendants in error received and stored in their elevator, one million bushels of grain for one year, and received the usual rate for storage, the receipts of the elevator, as shown by the evidence, would amount to $150,000 for the year, but the claim of the elevator company is, that the railway company has further covenanted to pay the additional sum of $40,000 per year on account of the want of elevator capacity to receive five, instead of one million bushels per annum. Clearly such a covenant

upon the part of the president of the company, even if authorized by the board of directors, would be *ultra vires* the corporation.

This question received the consideration of the judge of the district court, on the demurrer to the declaration.

The opinion of the district judge is made a part of the record (page 25), but I do not think it is properly a part of such record. Under the plea and stipulation, the question of *ultra vires* may be fairly considered within the record.

The company is vested with the general powers of railway companies, as well as the responsibilities. It has all necessary authority to construct its road, to acquire property necessary therefor, to fix the amount of its capital stock, the number of directors, and after such general powers additional powers are given the corporation.

It has power to receive and convey persons and property on its railway. It has power to enter into all necessary contracts for the construction, maintenance and operation of its railway, but it has not authority, express or implied, to enter into or execute the contract of guaranty contained in article 8 of the agreement.

The voluntary payment of the amount of the deficiency claimed by the defendants in error would be a diversion of the funds of the railway company which a court of equity would restrain by injunction.

I am aware that the courts are not inclined to favor the pleas of *ultra vires*, especially when it appears that the corporation has enjoyed the benefits of a contract.

In *Railway Co.* v. *McCarthy*, 96 U. S., 267, the court defines the law as follows:

"When a contract is not, on its face, necessarily be-

"yond the scope of the power of the corporation by "which it was made, it will, in the absence of proof to "the contrary, be presumed to be valid. Corporations "are presumed to contract within their powers. The "doctrine of *ultra vires*, when invoked for or against a "corporation, should not be allowed to prevail where it "would defeat the ends of justice or work a legal wrong."

It is not denied that courts should be clearly satisfied that a contract is *ultra vires*, before, at the instance of the corporation, they release it from the obligations which it has voluntarily assumed.

We do not claim that the covenant of the plaintiff in error to deliver at the elevators of the defendants in error, all the grain transported over its lines of railways, the delivery of which the railway company could lawfully control, is *ultra vires*, nor is it necessary for the purposes of this argument, to challenge the validity of a covenant upon the part of the railway company, that the amount of grain so transported should not be less than five million bushels per annum, but we do insist, that the alleged covenant of the railway company that the defendants in error *should receive* all the grain tendered by the plaintiff in error at the elevators for storage and handling, to the amount of five million bushels, is "beyond the scope of the power of "the corporation," and is, therefore, on its face invalid.

The application of the doctrine of *ultra vires* in favor of the corporation in the case at bar, would not work a legal wrong to the elevator company, for the reason that such application, under the evidence, would not deprive the defendants in error of any gains derived from the use of their elevators, it being admitted that during the years

of 1886 and 1887 these elevators were taxed to their utmost capacity, producing large revenues.

The material question now is, whether in addition to such revenues, under the construction of article 8, as claimed by the defendants in error, the railway company shall be compelled to pay the defendants in error a bonus of upwards of $40,000.

If this was the agreement of the president of the railway company, and is so expressed in the contract, then we insist that such covenant was *ultra vires* the corporation.

## IV.

THE CIRCUIT COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR JUDGMENT IN ITS FAVOR UPON THE FINDINGS OF FACT. THE EVIDENCE DOES NOT SUPPORT THE JUDGMENT OF THE COURT.

Under the admitted evidence, it cannot be denied that during the years 1886 and 1887, the defendant tendered for delivery and storage at the plaintiff's elevators, a quantity of grain largely in excess of the capacity of such elevators.

The amount of grain actually received was 6,217,398 bushels. This amount the plaintiff in error delivered, and also offered to deliver during said term 8,685,569 bushels of grain that the defendants in error were unable to receive.

The contention of the defendants in error is, that while their covenants only required that they should receive for storage, 1,000,000 bushels, the covenants of the plaintiff in error required the delivery of 5,000,000 bushels per

annum; that the deficiency in receipts for the two years was 3,782,602 bushels, and the action was brought to recover the penalty of one cent per bushel upon such deficiency.

After finding several undisputed facts, the court further found as follo ws:

"*Fifth.* The court further finds that the plaintiffs admitted in open court that during the years 1886 and 1887, grain was tendered by the defendant to the plaintiffs, for storage, and that it could not be received for the reason that the plaintiffs' warehouses were filled; that the grain so tendered amounted to 8,685,269 bushels, and that the plaintiffs never declined to receive shipments of grain from the defendant when such elevators had capacity to receive it, within one million bushels, and that when the plaintiffs refused to receive further grain for storage, the defendant was notified that it occupied the entire capacity stipulated for in the contract, at the time plaintiffs declined to receive the grain so tendered, to wit: 1,000,000 bushels.

"*Sixth.* That for the year 1886 the defendant paid for switching grain to other elevators, when the plaintiffs were unable, and therefore refused to accept the same, the sum of $2,871, and in the year 1887 the sum of $9,962.35, and that the cost of train service for the defendant, in delivering such grain to other elevators, amounted to about the same sum. That the defendant also, during said year, contracted with parties having grain stored in said elevators, to remove the same in order to furnish more room for the defendant; that for the removal of one hundred thousand bushels, the defendants paid the owners thereof $15,000, and that after such removal the plaintiffs refused to receive from the defendant for storage more than forty thousand bushels in place of the grain that had been so removed, for the reason that the amount of additional grain exhausted the storage and handling capacity of said two elevators; that it was to the interest of the defendant to deliver all the grain to the plaintiffs at said St. Paul and Fulton elevator during said year; that during the two years in controversy, the entire

storage capacity of said elevators was constantly occupied by grain received from the defendant's cars, and although the plaintiffs refused to receive additional grain tendered by the defendant during the same period, their refusal was always based upon the ground that their elevators were full, and contained more than one million bushels of grain received from the defendant." (Rec. 40.)

These special findings clearly demonstrate the fact, that it was impossible for the plaintiff in error to perform its alleged covenants. The plaintiffs claimed, and the court held, that the defendant undertook that there should be received five millions bushels per annum, while the capacity of such elevators was but one million bushels; that if the plaintiffs received and held for storage, one million bushels per annum, they had discharged their full obligations to the defendants, while the obligation assumed by the defendant was, that the elevator should receive five million bushels per annum.

I apprehend it will be very difficult for the counsel of defendants in error, to find any authority for the support of this construction of the contract. From these special findings, it appears that the plaintiff in error was greatly damaged and prejudiced in the prosecution of its business as a common carrier of grain, by the refusal, or inability, of the defendants in error to receive the grain actually tendered.

It further appears that the railway company, during the years 1886 and 1887, expended about the sum of forty thousand dollars in procuring further storage for the grain transported over its lines, and yet if the judgment of the lower court is to stand, the company will be required to pay the further sum of nearly forty thousand dollars, making in the aggregate about eighty thousand

dollars actual loss to the plaintiff in error, for the refusal of the defendants in error to receive all the grain tendered at said elevators for storage.

The court further finds that if one million bushels of grain remained in such elevators during the year, the defendants in error would receive as regular charges for such storage, the sum of $150,000; also " that if said ele- " vators could be kept employed with first storage, that " is, if one million bushels could pass through said eleva- " tors each ten days, the charge for the year would " amount to about $270,000."

But to produce this amount of revenue from " first " storage," the elevators would be required to receive and discharge 36,500,000 bushels of grain per annum, while " first storage" charges on five million of bushels would amount to only $37,500.

It appears, therefore, that the plaintiffs in error sustained no loss by reason of the grain remaining in store, but on the contrary, were directly benefited to an amount exceeding $100,000.

It is impossible to reconcile this judgment to any legal, or equitable consideration of the evidence. The inability of the defendants in error to receive from the railway company the full amount of five million bushels of grain per annum, by reason of the constant occupancy of such elevators to their fullest capacity, was most fortunate, and afforded the plaintiffs the most profitable use of such elevators. They do not, and cannot claim, under the findings of the court, that they have been damnified by reason of the alleged breach of covenant, but on the contrary, their earnings have been increased more than threefold.

The court further finds (p. 47), "that the length of "time that said grain remained in store was not regu- "lated or controlled by either of the plaintiffs or defend- "ant, but by the shippers or owners of such grain."

It is not at all reasonable that the defendants in error would have made any possible change in the occupancy of their elevators, even if they had the power to control the length of time that such grain should remain in storage, but on the contrary, it appears that the interest of the defendants in error would be promoted by influencing long, instead of short storage.

The Circuit judge, in his opinion says:

"During this period the entire storage capacity of the elevators was constantly occupied by grain received from the defendants' cars, and although the plaintiffs repeatedly refused to receive additional grain tendered by the defendant during the same period, their refusal was always based upon the ground that the elevators were full and contained more than one million of bushels.

"By the third article of the contract, the defendant agreed that so far as it could legally control the same, it would deliver to the plaintiffs for storage, all the grain it carried to Chicago, and by the article quoted the defendant *guaranteed* that the plaintiffs could annually receive into the two elevators for storage, at least five million bushels, and if during any year of the lease the plaintiff should receive less than that amount, whether tendered or not by the defendant, it would pay the plaintiffs one cent per bushel on the difference between the amount actually received, and five million bushels." (Rec., 42.)

If the Circuit judge intended to hold that article 8 was a contract of guaranty that the elevators should receive five million bushels of grain per annum, then there is no evidence whatever of any loss resulting from the alleged breach of guaranty, and I assume it will not be

held that there could be a recovery for a breach of guaranty without proof of loss sustained by such breach, beyond nominal damages. The same rule would apply if the one cent per bushel is considered as a penalty. In either case there should be evidence of resulting damage.

It is not claimed, or pretended, that one cent per bushel on such deficiency is the agreed liquidated damages between the parties, nor can it be reasonably claimed that one per cent. per bushel could be assessed as damages in the absence of all proof showing, or tending to show, that such was the measure of the plaintiffs' damages. In estimating these damages, the Circuit court entirely overlooked an essential provision, or condition of article 8. This article provides that the grain received at such elevators, from the party of the first part, "shall be at least "five million bushels on an average for each year during "the term of this lease," and further provides that settlements shall be annually made, "and whenever it shall ap- "pear at the close of any year that the total grain re- "ceived during so much of the term of this lease as shall "then have elapsed, does not amount to an average of "five million bushels for each year, the party of the first "part shall pay to the parties of the second part, one "cent. per bushel for the amount of such deficiency."

This contract took effect January 1, 1881, and therefore had been in operation for five years before the first alleged default. Evidence of deficiency during the years 1886 and 1887 would not of itself support the judgment, in the absence of proof of the amount of grain received at the elevators during the preceding five years. There might have been a deficiency during these two years, and at the same time an average for the expired term, of more than 5,000,000 bushels per annum, and therefore no

breach of the contract. The breach as assigned should have covered in apt language the entire expired term of the contract, and in the absence of such necessary averment, the evidence must support a breach of covenant as expressed in article 8. In this the evidence and the special finding of facts entirely fail .

There is no evidence that the plaintiff in error was guilty of a breach of its covenant, nor any finding that at the close of the year 1887 the total grain received during so much of the term of this lease as had elapsed did not amount to an average of 5,000,000 bushels for each year, and in the absence of such proof it would seem to follow, that the Circuit court erred in assessing damages against the defendant at one cent per bushel for the alleged deficiency for the years of 1886 and 1887.

We respectfully submit, that for manifest errors in the record, the judgment of the Circuit court should be reversed.

EDWIN WALKER,
*Atty. for Plaintiff in Error.*

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IN THE

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, A. D. 1892.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
*Plaintiff in Error,*
*vs.*
ALFRED M. HOYT ET AL., SURVIVORS ETC.,
*Defendants in Error.*

Error to the Circuit Court of the United States for the Northern District of Illinois.

## BRIEF AND ARGUMENT ON BEHALF OF DEFENDANTS IN ERROR.

BY

JOHN N. JEWETT.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.

IN THE

# Supreme Court of the United States.

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*Plaintiff in Error,*
*vs.*
ALFRED M. HOYT ET AL., SURVIVORS ETC.,
*Defendants in Error.*

Error to the Circuit Court of the United States for the Northern District of Illinois.

## STATEMENT OF FACTS.

Early in the year 1880, The Chicago, Milwaukee and St. Paul Railway Company (hereafter called the Railway Company), was desirous of securing, at Chicago, accommodations for the handling and storage of the bulk grain brought to Chicago over its lines of railroad, which was not *specially* consigned to existing warehouses. It is not necessary to do more than state a fact, now a part of common knowledge, that the freight depot accommodations of railroad companies, except as they may be specially provided, are not, and were not in 1880, adapted to the receiving and delivery of *bulk* grain, that is, *loose*

grain, shipped by the car-load, without sacking or other enclosures, making it capable of manual handling.

The amount of this *unconsigned bulk* grain business, which the Railway Company was obliged to provide for, was, of course, well understood by the officers of the company from the experience of prior years, and it may be presumed, that the necessity for providing for it had become imperative.

In this view of the situation, the contract, which is here involved, was entered into. The contract was one of two or more alternatives within the control of the Railway Company, viz: 1st. It could build its own grain warehouses, commonly called elevators; 2d. It could contract with other parties for such grain storage facilities as experience had shown to be important; and 3d, it might determine to let the business run, as it had run in the past, taking the chances for the storage of its *unconsigned bulk grain*, as accommodations therefor could be found, or holding it in cars, subject to its obligations as a common carrier, until specific delivery was made.

The second alternative above suggested seems to have been the one adopted, and out of that adoption grew the contract now in question. This contract imports *on the face of it*, that the Railway Company owned lots 3, 4 and 5 in block K, of the original town of Chicago, which were so located as to be available for the erection of a grain warehouse, accommodating in part, at least, the grain traffic of the Railway Company.

The contract also imports, upon its face, that the defendants in error owned lots 1 and 2 of the same block, upon which there was standing a grain warehouse, also owned by them, and in use for the receiving, storage and handling of grain *in bulk*. It may be assumed that

those two properties were adjacent, as the numbers of the lots follow in consecutive order.

The contract which grew out of these conditions bears date February 18, 1880, and is the foundation of this action. It is set out in full in the first count of the declaration (Rec., 4 to 9), and again (unnecessarily, perhaps) in the special findings of the Circuit judge, at pages 35 to 39. For the purposes of this case only a few of the provisions of that contract are important.

## Contract.

The contract was between the Railway Company, as party of the first part and the members of the firm of Jesse Hoyt & Co., of New York, and Perry H. Smith and George L. Dunlap, of Chicago, as parties of the second part, of whom the defendants in error (the plaintiffs below) are the survivors.

The *first* article of the contract is a lease by the Railway Company to Hoyt and his associates of lots 3, 4 and 5 in block K, for a period of ten years from January 1, 1881, "at an annual rental of $3,850, to be paid quarterly, * * "* * together with all taxes and assessments that may "be levied upon said premises during the term." * * *

By the *second* article, Hoyt and his associates agreed to erect on said lots 3, 4 and 5, a grain elevator "of a "storage capacity of seven hundred thousand (700,000) "bushels or more, during the year 1880." The article provides as to the quality of the elevator, and that it should be constructed to the satisfaction of the Railway Company. No question is raised upon this article. The case admits that it was fully executed.

By the *third* article, the Railway Company "agrees to "lay all necessary tracks adjacent to said elevator, to "connect its railway therewith for the purpose of deliv- "ering grain in cars thereto," and keep them in repair, etc., "and agrees to deliver on said tracks, in cars, at "said elevator to the parties of the second part, all the "grain that may be brought to the City of Chicago, *so "far as the party of the first part can legally control the "same*, for handling and storage in said elevator." The case involves no breach of this article.

By the *fourth* article, it is provided as follows: "The "said parties of the second part" (Hoyt and associates) "agree to receive, handle and store said grain as de- "livered in the usual manner of handling grain in the "City of Chicago *to the extent of the capacity of said ele- "vator so to be constructed, and in addition, agree, that "they will use for the same purpose, so far as their other "engagements will allow, the elevator now standing on lots "one (1) and two (2) of said block, and that said party "of the first part shall, at all times, be entitled to storage "for its grain* TO THE EXTENT OF AT LEAST ONE MILLION "(1,000,000) BUSHELS.

"The parties of the second part, with the consent of the "party of the first part, may receive grain for storage from "other parties and from river and canal craft; *but in case "such grain is so received so as to reduce the capacity of the "parties of the second part to accommodate the party of "the first part to the extent of one million (1,000,000) "bushels in said elevators, the said parties of the second "part* AGREE TO FURNISH STORAGE IN OTHER ELEVATORS, "*to the party of the first part, to the extent that their ca- "pacity is so reduced,* WITHOUT EXPENSE *to the said party "of the first part for switching or otherwise.*" THE CASE

INVOLVES NO VIOLATION OF THIS ARTICLE BY EITHER OF THE PARTIES.

The *fifth, sixth and seventh* articles, taking them in their order, relate 1st, to the charges to be made for the storage and handling of grain—certain elevators accommodating the grain business of competing railways being referred to as a standard; 2d, to the rebuilding of the elevator in case of its destruction by fire or other casualty, and that the "parties of the second part will save "the said party of the first part free and harmless from "all loss or damage by fire to said elevator or contents "during the continuance of this lease," * * * and 3d, to the weighing of the grain received into the elevator, and the appointment of weighers. In all these respects, the case presents no questions of controversy. The last clause of the *Seventh* article *has been insisted upon* as having some bearing upon the case by the counsel for the Railway Company, and it is therefore given in full, as follows: "It is further agreed that the parties of the "second part will, at all times, keep a force at said ele- "vators *sufficient to transact all business that may be* "*offered by said party of the first part, and that cars of* "*grain will be received and unloaded, when the business of* "*the party of the first part requires it, in the night time* "*or on Sundays, and that said business shall be dispatched* "*with equal and as great facility in that respect* AS AT "ANY OF THE ELEVATORS IN THE CITY OF CHICAGO ABOVE "MENTIONED, *so as not to delay the cars of the party of the* "*first part unreasonably or unnecessarily.*" In passing, for the present, articles 5, 6 and 7, including the last clause of article 7 above quoted, it is sufficient to say *that the case shows* no violation of any or either of these provisions, on the part of the defendants in error.

The *eighth* article of the contract in its relations to the pending suit (but of course to be considered in connection with the preceding and subsequent ones so far as important) is the *pivotal* point of the case. It reads as follows:

"*In consideration of the agreement aforesaid the said* "*party of the first part agrees that the total amount of* "*grain received at said elevators from the party of* "*the first part shall be at least five million bushels,* "*on an average, for each year during the term of this* "*lease, and in case it shall fall short of that amount, the* "*said party of the first part agrees to pay to the said par-* "*ties of the second part* ONE CENT PER BUSHEL ON THE "AMOUNT OF SUCH DEFICIENCY, SETTLEMENTS TO BE "MADE AT THE CLOSE OF EACH YEAR; *and whenever it* "*shall appear at the close of any year that the total grain* "*received during so much of this term as shall then have* "*elapsed does not amount to an average of five million* "*bushels for each year, the party of the first part shall pay* "*to the parties of the second part one cent per bushel for* "*the amount of such deficiency*; but in case it shall after- "wards appear that the total amount recived up to that "time equals or exceeds the average amount of five million "per annum, the amount so paid the parties of the "second part shall be refunded, or so much thereof as "the receipts of the year shall have exceeded five million "bushels, so that the whole amount paid on account of "deficiency shall be refunded should the total receipts "for the entire term equal or exceed fifty million bushels "in all, on (or?) an average of five million bushels for "each year."

The remaining articles of the contract, including the supplement thereto, are comparatively, if not entirely,

unimportant for the purposes of this case, and may be left to such reference as may seem desirable for illustration in the course of the argument. The contract and the supplement were executed under the seals of the respective parties.

The record (page 2) shows, that the action (in form *assumpsit*) was commenced in the Superior court of Cook county, Illinois, on the 26th day of May, 1888, and that afterward, and before the filing of the declaration, by leave of that court, based upon a stipulation of the parties, (Rec., 4) the form of the action was changed to *covenant*. After the declaration was filed, the case was transferred by the Railway Company into the United States Circuit court for the Northern district of Illinois.

The declaration consists of two special counts. In the *first* count the contract is set out *in haec verba*—in the *second*, according to its tenor and effect. The same breaches are assigned in each.

The declaration was demurred to by the Railway Company. The demurrer was overruled by Judge Blodgett, as to the first, second, third and fourth breaches assigned, and sustained as to the fifth breach. (Rec., 29.) The plaintiffs below then withdrew the fourth and fifth assignment of breaches in each count. Judge Blodgett's opinion upon the demurrer is found on pages 25 to 28 of the record. Pleas were afterward filed, all of which except the first, which was a plea of general performance, were demurred to; but by a stipulation (Rec., 30) all *special pleas* were waived, with leave to both parties to avail themselves of all the evidence pertinent on either side under the issue formed upon the plea of *general performance*. Afterwards the cause was submitted to Judge Gresham for trial—a jury being waived (Rec., 31) with

the result of a finding and judgment in favor of the plaintiffs below, of $33,783,83 and costs. The pending writ of error calls in question that judgment. Judge Gresham's opinion is found on pages 42 to 44 of the record. In arriving at the amount of the judgment the rental for lots 3, 4 and 5 (and interest) as specified in the first article of the contract was allowed by way of offset.

The action relates to the operations under the contract for the years 1886 and 1887. The declaration, in both counts, with something of prolixity, perhaps, avers full and complete performance of the covenants of the contract on the part of the plaintiffs below. The breaches alleged are, in substance, that during the years 1886 and 1887 the grain delivered to and received in said two elevators did not amount to 10,000,000 of bushels, that the deficiency in the year 1886 was 1,740,194 bushels, and in 1887, 2,042,408 bushels, and for the two years, 3,782,602 bushels, for which compensation was claimed at the rate of one cent per bushel under the eighth article of the contract, amounting, without interest, to the sum of $37,826.02.

The findings of the court, so far as those findings relate to the facts of the case (the evidence is not before the court), indicate that the plaintiffs below erected the elevator on lots 3, 4 and 5, as required by the contract, with a storage capacity of 750,000 bushels (Rec., 40), and that that elevator from January 1, 1881, and also the old elevator on lots 1 and 2, having a storage capacity of 350,000 bushels, were continuously kept in operation for the receiving, storing and handling of grain. That during the years 1886 and 1887, those elevators were *exclusively* used for the accommodation of the grain business of the Railway Company, no grain being received into

them from any other source, and the *deficiencies* for those years were shown to be as above stated. It further appears from the special findings, that the plaintiffs below never refused to receive grain for storage and handling from the Railway Company under the terms of said contract, within the two years involved in this action, except at the time or times, when the full *storage capacity* of the two elevators was actually occupied by grain stored therein, which had been received from said railway company, and when the Railway Company was actually occupying and using the full one million bushels of *storage capacity*, for which it had stipulated, or more. (Rec., 41 and 43.) It also appears from the *special findings* that in the usual course of handling grain in Chicago, a *storage capacity* of 1,000,000 bushels was deemed sufficient for the storage and handling of 5,000,000 bushels *per annum*, and that much more than that had been stored and handled in an elevator of much less capacity, in a single year.

This statement outlines, in a general way, the elements of the case, as embodied in the *special* findings of the Circuit court above referred to. It is, perhaps, proper to add, that by an assignment of the contract of February 18, 1880, by Jesse Hoyt and his associates, the execution of it on their part was devolved upon the firm of Munger, Wheeler & Co., owners of several other elevators in Chicago, and hence the action was brought in the name of Alfred M. Hoyt and others, as survivors, etc., for the use of Munger, Wheeler & Co.

The record shows a series of propositions submitted to the court below (Rec., 32 to 35), which are, presumably, an embodiment of the theory of the case on the part of the Railway Company. Following these propositions (Rec.,

35 to 44) are the *special findings* of the circuit judge. There is in the record, which was, of course, made up by the Railway Company, no *bill of exceptions embodying the testimony introduced on the trial. If it is to be assumed* that the *special findings* of the circuit judge stand in place of the *evidence* or the substance of it, then the propositions submitted on behalf of the Railway Company must, as to their appropriateness and application, be tested by these *special findings* and investigated with reference to them, or, in other and, perhaps, better words, the *special findings* are conclusive of the situation to which the law must be applied. In this view, the *special findings* and *propositions* may deserve a fuller statement.

*The* SPECIAL FINDINGS *are in substance as follows:*

1st. The proper execution, under seal, of the contract sued upon, which is set out in full. (Rec., 35 to 39.)

2d. That Jesse Hoyt and his associates erected the new elevator on lots 3, 4 and 5, in accordance with the terms of the contract, "with a working (storage?) capa-"city of 750,000 bushels; that the storage or working "capacity of the elevator known as the Fulton elevator" (the old elevator on lots 1 and 2) "was 350,000 bushels, "both elevators affording storage and working capacity "of about 1,100,000 bushels of grain."

3d. That Munger, Wheeler and Company, as assignees of Jesse Hoyt and his associates, built the new elevator and have controlled and operated the same, and the old Fulton elevator, continuously since December, 1880, and still operate them; that said firm during the same time also owned and controlled six other elevators in Chicago, making eight in all, with an aggregate storage capacity of about 6,000,000 bushels of grain.

4th. That there was received from the Railway Company for storage in the St. Paul elevator (the new one) and the old Fulton elevator, during the year 1886, 2,826,821 bushels of grain, and from the same source in another elevator of Munger, Wheeler and Company (the Union) 432,955 bushels, making a total of 3,259,806 bushels, received and credited to the Railway Company during that year. That in the year 1887 there was received from the Railway Company in the new St. Paul elevator 2,300,292 bushels of grain, and in the old Fulton elevator 657,300 bushels—a total of 2,950,592 bushels in that year, and "that all the grain received and handled * * * in "the St. Paul and Fulton elevators during said years," viz: 1886 and 1887, was received from the Railway Company, the plaintiff in error.

This imports that during said years 1886 and 1887 the whole storage capacity of the new and the old elevators, amounting to 1,100,000 bushels, was entirely given up to the grain business of the Railway Company, and that nearly a half million of bushels of grain, received from the Railway Company, was accommodated elsewhere, without extra charge, making in all, for the two years, 6,210,398 bushels, for which the Railway Company is credited under the contract, leaving a deficiency for said years of 3,789,602 bushels.

5th. That during said years 1886 and 1887 grain was tendered by the Railway Company for storage in said elevators, which could not be received, *for the reason that the elevators were full;* that the total of grain tendered (which would include the amount actually received and stored) amounted to 8,685,269 bushels; that the defendants in error never refused to receive grain for storage from the Railway Company, except when the Railway Com-

pany was actually occupying in said elevators, the full 1,000,000 bushels of storage capacity, which it had stipulated for in the contract, of which fact the Railway Company was notified at the time.

6th. That in the year 1886, the Railway Company paid for switching grain to other elevators, when the defendants in error " were unable, and therefore refused to " accept the same the sum of $2,871.00, and in the year " 1887 $9,962.35", and that the cost of train service in making such deliveries was about the same sum.

That during said years the Railway Company paid for the removal of 100,000 bushels of grain from said elevators, in order to secure storage space, $15,000, and that after such removal, the defendants in error refused to receive in place of the grain so removed, more than 40,000 bushels, "*for the reason that that amount of additional* " *grain exhausted the storage and hauling (handling?)* " *capacity of said two elevators.*" That it was for the interest of the Railway Company to deliver all its grain at said elevators.

" That during the two years in controversy, the entire " storage capacity of said elevators was constantly occu- " pied by grain received from the defendants" (the Railway Company's cars) and that although additional grain tendered was refused, such " *refusal was always based* " *upon the ground that these elevators were full and con-* " *tained* more than 1,000,000 bushels of grain received " from the defendant."

That at *one* (no ?) time during the years 1886 and 1887 was any grain refused for storage in said elevators, " *when there was any unoccupied storage space* in the " same." That some of the grain remained in store so

long that the defendants in error *were unable* to receive or handle for the Railway Company the full amount of grain contemplated by the contract, or the full amount tendered by the Railway Company. "And that but for "this *unusual* condition the plaintiffs" (defendants in error), "would have received and stored all the grain "*tendered* by the defendant."

7th. That the regular charges for storage of grain in said elevators, during the years 1886 and 1887, were ¾ cent per bushel for the first ten days and ½ cent per bushel for the subsequent ten days, making 1¾ cents for thirty days. (This is a mistake. The storage would be 1¾ cents for the first thirty days and 1½ cents for each subsequent thirty days, whilst the grain remained in store. The mistake, however, is unimportant.) That for 1,000,000 bushels stored in the said elevators continuously for one year the charges would amount to $150,000, and that if said elevators could be kept employed with first storage, "that is, if 1,000,000 could "pass through said elevators each ten days the charges "for the year would amount to $270,000.

"That the length of time that said grain remained in "store was not regulated or controlled by either the plaint-"iffs or defendant, but by the shippers or owners of such "grain."

8th. "That the plaintiffs have kept the account of all "their elevators together and therefore could not state "the earnings of the elevators in question for the years "1886 and 1887."

9th. That there is no evidence of the amount of earnings of said elevators, during the years 1886 and 1887, or of the income of the defendants in error therefrom during

said years. Nor any evidence of actual damage sustained by them by reason of their not handling in said elevators during said years the full amount of 10,000,000 bushels of grain, or by reason of the alleged breach of covenant by the Railway Company, "other than the one cent per "bushel for the years 1886 and 1887, as prescribed by "article 8 of the contract."

The *propositions* submitted by counsel for the Railway Company (Rec., 32–35) condensed and simplified, are in substance as follows:

1st. This proposition attempts to define and limit the cause of action of the defendants in error, and sets out in full article 8 of the contract sued upon, and as a charge of the defendants in error "that the total amount of grain "received in the elevators mentioned in said indenture "during the years 1886 and 1887 did not equal the ten "milllion bushels * * * covenanted by the defend-"ant in said indenture to be therein received during "those years, but, on the contrary, that the total amount "of grain received in said elevators during said two "years, allowing to said defendant a full storage capacity "in said elevators of one million bushels stipulated for in "said indenture was less than ten million bushels prom-"ised to be therein delivered by the defendant during "said years of 1886 and 1887 by 3,782,602." * * *

"The defendant denies all breaches of said covenant, "and charges that during said years 1886 and 1887 said "defendant received in the city of Chicago, for delivery "for storage in the said elevators, the full amount of ten "million bushels of grain," and tendered the same to plaintiffs for storage "and charges that the plaintiffs "failed and refused to receive said amount of grain "for storage.

" And that said plaintiffs refused to receive for storage " the full amount of such deficiency charged in said breach, " and charges full performance of all the covenants in " said breaches assigned to be kept and performed by the " defendant."

Following this attempted exposition of the case, the proposition concluded as follows:

" Therefore, if the court finds from the evidence that " defendant was ready and willing to deliver during said " years 1886 and 1887, in said elevators, or tendered the " plaintiffs for storage during said time said amount of " ten million bushels of grain, and that said plaintiffs " would not *or could not* receive the same for storage, or " refused to receive the same for storage when tendered, " there is no breach by the defendant of said covenant as " charged in said declaration, and the plaintiffs cannot " recover."

2d. The second proposition asks the court to hold that *the eighth article of the contract is void for want of mutuality* FOR THE REASON *that the railway company did not agree to deliver, and Jesse Hoyt and his associates did not agsee to receive and handle 5,000,000 bushels of grain per annum.*

3d. This proposition submitted, is, " that the evidence " wholly fails to support the plaintiff's claim *as alleged in* " *the declaration, and judgment, therefore*, should be given " for the defendant."

(*Punctuation*, in the printed record, is not followed in this statement.)

4th. If the court shall find, that there *is no evidence* that the plaintiffs have suffered damage by reason of the breaches of the contract charged in the declaration, they cannot recover.

5th. That if the court finds that under the contract and evidence, the plaintiffs did not covenant to furnish more than 1,000,000 bushels of storage capacity, nor to receive, handle and store more than 1,000,000 bushels of grain at a time, *then* the defendant requests the court to hold that the plaintiffs cannot recover of the defendant either by way of storage or damages or penalty, any sum for grain tendered by the defendant, and refused by the plaintiffs.

6th. "It was admitted by the plaintiffs in open court "that during the years 1886 and 1887, 8,685,269 bush- "els of grain were tendered by the defendant to the "plaintiffs for storage in said elevators, *but that the de- "fendant could not receive the same for the reason that the "elevators during said time were filled with grain;* and "if the court find from the evidence on said admissions, "that during said years, the plaintiffs could not or would "not receive the grain so tendered, and that the defend- "ant in the regular course of its business as a carrier, "was compelled to seek storage for said grain transported "over its line, in other elevators situated on other railroads "and to pay additional charges therefor, then the de- "fendant requests the court to hold, that there has been "no breach of said contract on the part of said defend- "ant as charged in said declaration, and the plaintiff "cannot recover.

7th. "If the court finds from the evidence that under "said contract the plaintiffs covenanted to receive from "the defendant and furnish the defendant continuous "storage during said years, 1886 and 1887, for only one "million bushels of grain, and that during said time the "defendant did deliver the plaintiff for continuous stor- "age said one million bushels of grain, and did deliver to

"the plaintiffs at said elevators all the grain that the "plaintiffs could therein handle during said time, then "the court should hold as a proposition of law, that the "defendant is not guilty of any breach of covenant in "this respect and the plaintiff cannot recover.

8th. "If the court shall find that during the said "years of 1886 and 1887, the defendant delivered to the "plaintiff at said elevators for storage all the grain that "the plaintiffs could therein handle, and that during said "period of time, said defendant tendered the plaintiff "for storage in the said elevator, a large amount of other "grains which the plaintiff could not or would not receive "for storage, and also that said elevators were, during "said years, filled with grain delivered by the defendant "to the extent of their capacity, then the court should "hold that the plaintiffs have sustained no damage by "reason of said alleged breach of covenant and they can-"not recover.

9th. "The defendant further requests the court to "hold as a matter of law, that the agreement in said "article 8, that 'the party of the first part shall pay "the parties of the second part, one cent per bushel on "the amount of any deficiency of grain received at said "elevators, as provided in said article, is not liquidated "damages, but on the contrary, is either a penalty, or "in the nature of a penalty, which requires proof of act-"ual damage before a recovery can be had of such pen-"alty or any portion thereof.

10th. "There is no evidence in the case of any "actual damages which entitle the plaintiffs to recover "either all or any portion of the penalty at one cent per "bushel as set forth in said article 8, and therefore "the plaintiffs cannot recover."

The circuit judge, before whom the case was tried, refused to approve of the propositions and each of them, and, it is to be assumed that such refusal will be insisted upon as error, and chiefly relied upon for a reversal of the judgment.

It will be noted that nearly all of the propositions (all of them except the second and ninth which attempt to state abstract propositions of law based solely upon the terms of the contract sued upon), have direct reference to the *evidence* in the case. That *evidence* is not preserved in the record. This is the first record in this court, which I have ever had occasion to consider, in which the substance of the evidence as such, was not preserved. For the condition of the record in this respect, if it is defective, the plaintiff in error is responsible. It is certain, however, that the *evidence* cannot be referred to for the purpose of ascertaining whether there was anything in it, which justified the suggestions of fact with which the propositions are prefaced. Evidently such propositions are submitted at the close of the trial and when the facts have been developed by the testimony and before the "*findings*" of the court have been prepared, and for their appropriateness must rest upon the testimony as actually given and not upon the *subsequent* findings of the court. The arrangement of the record imports this, for the "*propositions*" precede the "*findings*." What I mean to suggest, as a serious difficulty, is, that this court cannot, upon this record, say whether or not the *evidence* laid a foundation of fact for the giving or refusal of the propositions submitted, and, therefore, this court cannot consider the propositions, which upon the face of them are predicated upon what the *evidence may* have disclosed, and for the simple reason that the *evidence is not before*

*the court.* It would be of no use for me to say, that I protested against this form of the record. It is sufficient that it *does not appear* that, as the attorney for defendants in error, I assented to it. It is understood, of course, that this court will not review questions of fact; but it is equally understood that it will look into the *evidence* sufficiently to determine whether propositions, which refer the court to the evidence as a controlling element, have any support in the *evidence itself.* Where that evidence is wholly wanting, this court cannot consider the propositions of law which may be presented, predicated upon that *evidence.*

The bill of exceptions, if there is anything in the record of the case corresponding to a *bill of exceptions*, carefully suppresses the evidence. Any argument upon the *propositions* which refer to the *evidence* for their support is impracticable, nor can the findings of the Circuit court, if there was occasion to except to them, be compared with the *evidence* itself, as the record now stands. *It is insisted* therefore, that all the propositions submitted, which depend for their pertinency and appropriateness upon the *evidence* in the case, and the rulings of the court upon them, cannot be considered in this court.

The peculiar conditions which have surrounded the adjustment of differences growing out of the contract sued upon, induce me to insist upon such substantial objections to the record, as are, according to my apprehension, well founded, and I have made the objection above indicated, not merely as a *technical* one, but because the absence of a "*bill of exceptions*" *embodying the evidence in the case*, greatly embarrasses the discussion of the *propositions* which were refused by the court, predicated upon that *evidence.* This court cannot say, that there was a particle

of evidence upon which the propositions could rest, unless it projects its vision over and onto the *subsequent findings* of the circuit judge, which are simply his estimate of the evidence and not the evidence itself, *to which the propositions refer*.

But if it must be assumed, that the *special findings* of the circuit judge, are a *full substitute for a bill of exceptions, embodying the evidence* (an assumption which would always be unfair), then the argument must proceed upon the basis of facts established by the *special findings*, and to that view of the situation, I am, *possibly*, compelled by the record, to submit. If "coming events cast their "shadows before," *the rulings* of the court upon the propositions submitted by the Railway Company are not open to objection, when tested by the subsequent *special findings*.

## BRIEF OF ARGUMENT.

1st. If the propositions of the Railway Company which refer to the evidence are to be tested as to their applicability by the *special findings*, then the refusal of them by the circuit judge was right, for the reason that the *special findings* do not correspond with the recited facts contained in the propositions, upon which the rulings of the judge were requested. This suggestion covers all of the propositions except the second and ninth.

2d. The second and ninth propositions which were properly refused, are, in themselves, misapprehensions of the scope and effect of the contract sued upon, and cannot be maintained upon any theory of legitimate interpretation or construction of the contract itself.

3d. The contract of February 18, 1880, is one within the corporate powers of the Railway Company. In the entire scope of it, it pertained to the transportation or carrying business, for which the company was presumably organized.

4th. The contract was in substance and effect, when rightly interpreted, a provision on the part of the Railway Company for a grain storage capacity of 1,000,000 bushels, coupled with an agreement on the part of Jesse Hoyt and his associates that they would furnish that amount of storage capacity for the grain business of the Railway company for a period of ten years from January 1, 1881, either in the new elevator to be erected on lots 3, 4 and 5, and the old one on lots 1 and 2, or elsewhere, *without cost to the Railway Company* for switching, etc.

5th. The contract *did not provide* that the railway

company should have storage accommodations for 5,000,000 bushels *at one time*, or that Jesse Hoyt and his associates should take care of all the grain which might be brought to Chicago by the Railway Company, unless it could be accommodated by the 1,000,000 bushels of *storage capacity stipulated for*.

6th. The contract *does not provide* that either party should incur expense for removing grain from the elevators, received in store from the Railway Company, in order to make room for further consignments. Whatever was done in that respect was done *gratuitously* and not by reason of any requirement of the contract.

7th. The case was tried in the court below upon *open issues*, and by this is meant that the field of investigation was not, under the stipulations of the parties, limited by special pleadings. The case stood and still stands upon its *legal merits*.

8th. The years of the contract, prior to 1886, are unimportant. *The presumption is* that the results of those prior years were adjusted between the parties, as the contract provides. *The case shows nothing contrary to this presumption.* Nor under the *open issues*, was any attempt made to involve the results of those years.

9th. The operations under the contract for the two years 1886 and 1887 are the only ones to be considered. The contract itself *required annual settlements and payments*. Each year stood by itself in this respect. If the previous years had developed any excess of receipts of grain for storage beyond the 5,000,000 bushels per annum, it devolved upon the railway company to show this.

10th. The *entire capacity* of the elevators—the new one on lots 3, 4 and 5, and the old one on lots 1 and 2,

aggregating almost 1,100,000 bushels—was, during the years 1886 and 1887 entirely at the disposal of the Railway Company.

11th. All the grain brought to these elevators for storage during those years was received and stored, except when the elevators were filled with grain actually received from said Railway Company and the company was actually occupying all the *storage capacity*, for which it had stipulated, and which Jesse Hoyt and associates had agreed to furnish.

12th. The deficiencies for those years, under the 8th article of the contract, are not a matter of dispute, and the damages assessed, and which have passed into the present judgment, follow, as a matter of course, the ascertainment of those deficiencies.

13th. The assertion, admitting it to be true that, at one or more times during the years 1886 and 1887, and when the new and the old elevators were filled with grain received from the Railway Company, and it was in the actual use of all the storage capacity it had contracted for, other grain was tendered for storage, is immaterial. *The limitations of the contract* exclude all such grain from consideration in the adjustment of the legal rights of the parties.

14th. If the Railway Company had built for itself an elevator with a storage capacity of 1,000,000 busheis, instead of making the contract of February, 1880, it would have been in no better condition during the years 1886 and 1887, than it was under the contract in respect to *surplus* grain, which the 1,000,000 bushels of storage capacity could not accommodate.

15th. The guaranty of 5,000,000 bushels of grain per

annum, contained in the eighth article of the contract, is expressly in consideration of the obligations of the contract assumed by Jesse Hoyt and his associates, every one of which, as the record shows, was literally and even generously performed. It was, doubtless, an inducement for Jesse Hoyt and associates to enter into the contract, since it gave an assurance that the investment made and to be made by them and put at the service of the railway company, would yield some profitable results. Their covenants were a good and sufficient consideration for the guaranty.

16th. It cannot be disputed that the Railway Company, under the powers necessarily *incidental* to its *express* powers as a common carrier of grain in bulk, had the right to construct a grain elevator for the accommodation of its grain business, and provide of itself for the storage and handling of grain, brought by it to Chicago, which was not specially consigned. The safe and orderly delivery of property, received by a carrier for transportation, and the care of it at the place of its destination, until such delivery can be reasonably made, is as much a part of his legal obligation as is the duty of safe transportation. Special conditions, of course, may qualify this obligation, and special contracts may modify it; but in the absence of such special qualifications and modifications, the rule is as above stated.

17th. Assuming that railway companies are what are called *quasi* public corporations (which is a designation of indeterminate value), the classification or description does not, and is not intended to take away or destroy their *private* character. At most, it simply means that such corporation act in a *dual* capacity, modern decisions would seem to say, first as agents or representatives of the public,

and second, as agents and representatives of private interests. The order of preference is still open to serious question upon constitutional provisions in behalf of *private* rights; but in any event, the *public* responsibilities of such corporations, whatever they may be, do not deprive them of the right and power, *in their private* capacity, to make contracts, in respect to their business and in furtherance of it, which do not impinge upon their public obligations, but rather increases the facilities for their performance. The contract in question is of this class.

18th. In such a case as this, the courts are only called upon to give effect to the contracts of parties as they have made them, and in accordance with their obvious meaning. It is to be presumed that the contract was entered into not only voluntarily, but understandingly. Neither party has sought to reform it, nor is this the forum to consider any question of reformation. Whether the contract in its execution has been profitable or unprofitable, on either side, and the extent to which it has proved profitable or unprofitable, are matters in no way affecting the validity of the contract or its binding obligation. With such an enquiry the court is not concerned.

## ARGUMENT.

If the statement of facts is sustained by the record, and the propositions applicable to these facts as above given are admitted, the argument on the part of the defendants in error, is practically made upon the merits of the case. And yet, perhaps, it will be proper to make some reference to authorities, and some reply to the brief and argument of the learned counsel for the plaintiff in error. It will be unnecessary to consider the several propostions separately, and, therefore, for purposes of argument, I shall group them in such manner as to meet, as best I can, the objections, urged by counsel for plaintiff in error, against the judgment under review, for, if the objections are not sustained, the judgment must be affirmed.

### I.

The elementary question in the case is well presented in the opinion of Judge Blodgett, in connection with his rulings upon the demurrer to the declaration already referred to, and which is a part of the record. If the contract was *ultra vires* of the railway company, or a *gambling contract*, within the meaning of legislation, and the recognized opinions of courts, and, going further, if it was a contract, which in the view of the law, falls within that class of contracts involving *impossibility of execution*, or want of *mutuality*, I should not hesitate to admit that the judgment must be reversed. The general suggestion, by way of reply to all these points of counsel for plaintiff in error, is, that they are not, nor are the authorities cited in support of them, applicable to the presnet

case. The contract here involved does not fall within either of these descriptions. It is not a contract *ultra vires*, it is not a *wager* contract, it is not a contract, *impossible of execution*, and it is not a contract *without mutuality of consideration*. These propositions are plainly stated, and the question for the court is, are they right under the law applicable to the facts.

## II.

### AS TO THE QUESTION OF ULTRA VIRES.

The opinion of Judge Blodgett upon the overruling of the demurrer to the declaration, already referred to, stated a correct theory of the case, when he said (Rec., 27): "The declaration shows what seems to me a "valid undertaking on the part of the defendant, that the "defendant will and does, in consideration that plaintiffs "will erect and maintain an elevator such as is called for "by the contract, guarantee to plaintiffs that each year "shall amount to a certain sum. This is neither a wager "contract nor is it *ultra vires*," etc. The opinion, as thus quoted, does not, however, embrace the full measure of the responsibilities and obligations assumed by the defendants in error, as a consideration for the guaranty; for, they were not only to build the new elevator, but also to operate it, and the old one adjacent and furnish, at all times, for the plaintiff in error *grain storage capacity* in said two elevators (or elsewhere *at their own expense*) to the full extent of 1,000,000 bushels, and, in addition to rental, to pay all expenses of carrying the property, including taxes, assessments and insurance, and *protect the plaintiff in error* against loss or damage by fire, etc., and following the contract into the articles subsequent to

those above recited, we find that it contained a provision that at the end of the lease, or upon disagreement between the parties as to the conduct of the business, the plaintiff in error was well secured in the right to purchase not only the new elevator, but also the old elevator and the lots on which it stood, at a valuation to be fixed by appraisers. These should be admitted to be obligations of no inconsiderable importance in the direct line of facilitating and protecting the grain business of the railway company, justifying and even demanding some assurance of advantage by way of reciprocal covenants. It is asserted confidently, that the record shows, that the defendants in error performed their covenants in every part, and that the averments of the declaration, in that respect, are *absolutely true*. In saying this, I do not overlook the fact that they refused to receive grain for storage and handling from the railway company *at the time or times when grain, actually received from its road*, was occupying the full 1,000,000 bushels of storage capacity which the defendants in error had agreed to furnish—a condition to be hereafter discussed.

The immediate question to be considered is the question of *ultra vires*, from which some digression has been made in following out the opinion of Judge Blodgett. The court will, I have no doubt, recognize the *dual capacity* belonging to that class of corporations, which is termed *quasi* public, and along with this recognition, must go, *pari passu*, a discrimination between contracts which relate to *public* interests and those which relate to matters of private concern. It is not to be inferred from the opinions of the courts in respect to such corporations, that a *quasi* public corporation cannot act in matters affecting the convenient transaction of its business, as a *private*

corporation, and *without consulting the public*, through legislation or otherwise. There must be some limit to this *pretentious* right of public control over corporations of the class referred to, or no act can be done by them, which will be legitimate, unless the *public* advice and consent are given to it—a proposition which would put an end to all the railroad operations of the country. If there are any contracts which a railroad company, as a common carrier, and a *quasi* public agency can make, in its *private* capacity and without the express advice or sanction of the *public*, a contract providing for necessary facilities for the transaction of its business, must be a contract of that class—and to that class, the contract in question, undoubtedly, belongs. The custom of receiving and transporting grain in bulk has been established for many years. What shall be done with it when it reaches the terminal point? Would it be a reasonable answer to say that it may be shovelled out upon the ground and there await the gathering up of the consignee?

It has never been disputed that railroad companies have the right and authority to erect passenger station-houses for the protection of passengers and their baggage upon arrival at destination. Neither *public* interest nor *public* sentiment would tolerate the dumping of passengers and baggage upon open ground, and the custom of the business and the incidental powers of the corporations both justify and require the provisions for shelter and protection which are universally made. Is it less important to the interests of the public, that railroad companies should provide for the safety and protection of freight of all classes, and *especially* for grain transported in bulk, when it reaches the end of actual transportation? If this cannot be done under the doctrine of *ultra vires*, then all

freight houses of all classes are constructed without authority, and may be inhibited for that reason. It may be assumed that such a proposition would not be admissible.

As already suggested, although arrangement and contracts for receiving and discharging passengers and freight, such as depots and freight houses, are, incidentally, for the benefit of the public, they are made and entered into by railroad companies, *as private corporations*, and for the immediate protection and safety of their business and business interests. If, therefore, the charter of a railroad company should be silent in respect to such provisions, the power to provide for them would be granted by implication, as a power necessarily incident to the general authority to control a transportation business.

It is the general rule, that all powers necessary for the purpose of giving effect to those *specifically* defined in a charter of incorporation, are granted by implication and those implied, are just as clearly conferred as though they had been specially named; so that, independently of the special law of Illinois to which Judge Blodgett refers in his opinion, the authority of the railway company to erect an elevator or to secure an elevator or elevators by contract, for the storage and handling of the grain brought by it to Chicago in bulk, must, from the nature of things, be ample, and having entered into such a contract, in its capacity, as a private corporation, and having received the benefit of it, it cannot, under the authorities of modern times, avail itself of the defense of *ultra vires*, for the purpose of evading its responsibilities, voluntarily assumed. *And this would hold true, even though the power to enter into the contract was originally wanting.*

It may be safely said, that the strict doctrine of the earlier decisions, in respect to the defense of *ultra vires* has been

greatly relaxed, and no longer applies to the case of an *executed* contract, although available for the *prevention* of the performance of an *executory* contract by injunction or other appropriate process at the instance of a party interested in such prevention. This relaxation of the former rule may be fairly said to be in the interest of justice, and upon the principle that it would be *gross injustice* to allow a party, even though a corporation, to enjoy all the benefits of a contract, and then repudiate its corresponding obligation for compensation under the plea, that it was without authority to make it.

Insisting that the contract in question was executed by the railway company, in its capacity as a *private* corporation, a few of the many authorities sustaining the above position may be referred to.

In *Whitney Arms Co.* v. *Barlow*, 63 N. Y., 62, the court at page 70, fairly states the distinction between executed and executory contracts, in their relation to the doctrine of *ultra vires*, and says: "It is now very well "settled, that a corporation cannot avail itself of the de- "fense of *ultra vires*, when the contract has been, in good "faith, fully performed by the other party and the cor- "poration has had the full benefit of the performance and "of the contract. If an action cannot be brought di- "rectly upon the agreement, either equity will grant re- "lief or an action in some other form will prevail. The "same rule holds *e converso*. If the party has had the "benefit of a contract fully performed by the corporation, "he will not be heard to object that the contract and "performance was not within the legitimate powers of the "corporation."

In *Chicago Building Society* v. *Crowell*, 65 Ill., 453, the court, at page 459, say: "But where corporations have ex-

"ercised powers incidental to those conferred, and in fur-
"therance of the general object of the corporation, *although*
"*the subject of the contract may not be within any express*
"*right conferred, they will be estopped from denying* that
"they had authority *to make such contracts. Good faith*
"*to third parties who deal with such corporations and who*
"*may have no accurate knowledge of their powers under their*
"*charters,* REQUIRES *the adoption of this salutary rule.*
"*The rule has its foundation in the plainest principles of*
"*natural justice.*"

In the recent work of Beach on Private Corporations Sec. 425, the author says: "The doctrine of *ultra vires* "as a defense, has died so hard that it is well to repeat "the proposition, which seems to be fully established by "the more recent decisions that when a contract has, in "good faith, been fully performed, either by the corpora-"tion or the other party, the one who has thus received the "benefit *will not be permitted to resist its enforcement by* "*the plea of mere want of power.* Time and again cor-"porations have been held estopped to plead *ultra vires* "to an action on a contract performed by the other parties "when the corporation has received the benefit, although "clearly beyond their powers."

Reports of state courts confirmatory of the above citations are too numerous to be collated. A few may be referred to:

*Bloomington M. Benefit Assn.* v. *Blue*, 120 Ill., 121–128.

*Bradley* v. *Ballard*, 55 Ill., 415.

*Darst* v. *Gale*, 83 Ill., 136.

*Peoria & S. R. Co.* v. *Thompson*, 103 Ill., 187–203.

*Thomas* v. *Citizens' Horse R. Co.*, 104 Ill., 462–464.
*Heims Brewing Co.* v. *Flannery*, Ill., 27 N. E. Rep., 286–289.
*Com. Bk. of Keokuk* v. *Pfeiffer*, 108 N.Y., 242–254.
*Starin* v. *Edson*, 112 N. Y., 206–215.
*Mayor &c. of N. Y.* v. *Huntington*, 114 N. Y., 631.
*Palmer* v. *Cypress Hill Cem.*, 122 N. Y., 429–435.
*H. & G. M. Co.* v. *H. & W. M. Co.*, 127 N. Y., 252–260.

In these cases many others are referred to, including a considerable list from English reports, and in Morawitz on Corporations, which, in some respects at least, may be regarded as a standard work, the author in volume II, p. 689, gives expression to the same view of the defense of *ultra vires*, and has collected with commendable diligence the authorities upon the subject.

I would, however, consider the question as almost unsettled, notwithstanding the reasoning in favor of the position taken, if that position did not have the actual support of the opinions of this court. And I find, on examination, that this court has carried the doctrine contended for farther than is necessary for my purpose in the present case, and I say this, for the reason that this court has given this doctrine of the law application to municipal corporations, which are corporations of a purely public character.

In *Hitchcock* v. *Galveston*, 96 U. S., 341, the court, at page 351, says: "At most, there was a defect of

" power. The promise to give bonds to the plaintiffs in " payment of what they undertook to do, was, therefore, " at farthest, only *ultra vires;* and *in such a case*, though " specific performance of an engagement to do a thing, " transgressive of its corporate powers, may not be en- " forced, the corporation may be held liable on its con- " tract. *Having received benefits at the expense of the* " *other contracting party, it cannot object that it was not* " *empowered to perform what it promised in return*, in " the mode in which it promised to perform."

So far as the facts and conditions required it, the same doctrine was applied in the cases of

*Railway Co.* v. *McCarthy*, 96 U. S., 258.
*Gold Mining Co.* v. *Natl. Bank*, 96 U. S., 640.
*Natl. Bank* v. *Matthews*, 98 U. S., 621.
*Natl. Bank* v. *Graham*, 100 U. S., 699.
*Jones* v. *Guaranty & Ind. Co.*, 101 U. S., 622.

The attorney of the railway company in his brief and argument (pages 45–58) discusses at considerable length the question of *ultra vires*, as though it were an appropriate defense in this case.

The general proposition with which the discussion is opened, viz: (page 46), " It is a general rule that when " a corporation in its contract *goes beyond its expressed and* " *implied power*, such contracts are *ultra vires* and void," in its application to *executory* contracts in respect to which the parties may be left in original positions by an enforcement of the rule, may perhaps be admitted, and it is possible, that a contract may be entered into by a corporation in relation to a subject-matter so distinctively remote from

the purposes of its organization, that the enforcement of it, in any stage of its operation, would be necessarily *a fraud*, not only in law but in fact, upon parties in interest; but putting a very extreme case, and relying upon the authorities already cited, I insist that, if a corporation, without any express power to borrow money, should, nevertheless, secure a loan of $10,000, or any other sum, which was actually received and used in its business, it could not *successfully* plead the doctrine of *ultra vires*, in defense of an action to recover the amount of the loan. The old doctrine of the law in its relation to such defenses has been greatly relaxed, and the reasons for this relaxation of the *old* rule are obvious, viz: the policy of many of the states, if not all of them as illustrated by their legislation, has been to encourage the formation of corporations, in almost every business pursuit. Notwithstanding the apparent popular hostility to aggregate capital under corporate forms, general acts of incorporation stand upon the statute books of the several states, which enable private interests to become corporate interests with important limitations of personal responsibility. Old and well established *firm* names are adopted as *corporate names*, and by the encouragement of legislation, the business of the country is conducted by corporations. It is of no use to discuss before the courts the propriety of this business change. The courts have been obliged to accept this situation, and act upon it, not, perhaps, to the extent of abolishing the rule, but by limiting its application, as some of the more recent opinions say "*in the interest of justice.*" The general rule may stand. *The question is as to its application.*

It should be unnecessary to analyze all the cases which are refered to by the counsel of the railway company in support of the defense of *ultra vires*. It may be doubt-

ful whether a majority of the decisions referred to in the argument for the railway company, would be sustained to-day in view of the change of business pursuits above indicated from individual or partnership to corporate forms. Nearly all of the cases arose before the change had been made, or had so far progressed, and, therefore, the change could not have been seriously considered.

The strongest case suggested may possibly be that of *Davis* v. *Old Colony R. R. Co.*, 131 Mass, 258, decided in 1881. The case is, also, one of the more recent to which reference is made, and yet in the preliminary part of it (page 259) there is a statement of general law apparently quite inconsistent with the rule laid down in the case of *Hitchcock* v. *Galveston*, 96 U. S., 341, where in the Massachusetts case it is said: "If it (a corporation) "makes a contract manifestly beyond the powers con- "ferred by its charter, *and therefore unlawful* (what does "that mean?) a court of chancery, *on the application of* "*a stockholder*, will restrain the corporation from carrying "out the contract; *and a court of common law will sustain* "*no action on the contract against the corporation.*" In the case of *Hitchcock* v. *Galveston*, heretofore quoted from, this court said, that the plea of *ultra vires*, a mere naked want of power, was insufficient to escape the responsibilities of an executed contract.

But will the court pardon me for a present illustration. The railroad companies centering in the city of Chicago have subscribed many hundred thousand dollars to the "World's Columbian Exposition." Various other corporations of a purely business character have subscribed many thousands more, and private citizens have subscribed according to their means. Would this court now hold that all such corporate subscriptions were *illegal and*

*void?* In the progress of events, we come face to face with differing conditions. Progress is arrested, unless these differing conditions are recognized, and the theories of the law, although still preserved, are brought into harmony with them. There is a business management for all corporations, on the side, at least, of its *private* interests. The courts cannot know what these private interests may be, nor how they may be best subserved. They may protect the *public* right, as determined by legislation, but the judicial power assumes a large responsibility (a responsibility not imposed upon it), in deciding that a particular contract, made by the management of a corporation in its private capacity, and evidently in view of its own advantage, cannot be enforced. I will not assume that the case of *Davis* v. *Old Colony Railroad* was wrongly decided, but I do mean to say that so long as public interests are not necessarily in issue under a contract made by a *quasi public corporation* (and I use the word *quasi* under protest, notwithstanding its antiquity) in its *private* capacity, that contract the court must sustain as a contract between individuals, unless the courts can see as *ancient magians* and understandingly, that the entire subject of the contract had no relation to the business or the business interests of the corporation in its private relations. If a railroad company should contract to pay a solicitor for business $5,000 per annum, the courts would enforce the contract, and yet the business the solicitors would bring to the road would be a matter absolutely speculative. *It might be nothing.* A hundred of such solicitors might be sent into the open field of traffic, with the same result, both in fact and before the courts. And yet will the courts say that a railroad company, as a private corporation, *in view of its increased*

*business to be obtained as a consequence* of such a general celebration as the "Boston Jubilee," or the "World's Columbian Exposition," cannot make a valid subscription to such an enterprise? Such a ruling would be in old phraseology, "*a sticking in the bark.*" The rule of *ultra vires* may be imperative, but the question still remains, *when should it be applied?* Upon the question of its applicability to the present case, *the conditions of the case must be observed, and all the provisions of the contract fairly considered.* The theory that *public interest* in railroad corporations overrides *private interest* must be discarded, for no *adverse public* interests are involved.

If the full text of all authorities cited by the attorney of the railway company should be admitted, the question would still remain, *does that text* have any appropriate reference to the facts of the present case? We reach this exact point; and for the reason that litigations are not sky-rockets for purposes of general illumination, but are, in an important degree at least, matters of purely *private* concern, affecting *private rights*, and civil actions mainly affect the interests of the immediate parties.

It would be difficult to affirm, in view of the authorities already referred to, and of the enlargement of the scope of corporate enterprises, that the strict theories of the law upon the subject of *ultra vires* were not too literally applied in the Massachusetts case. If a railroad company can at great expense, open offices and establish agencies for the solicitation of business, it is not easy to see why it may not subscribe a fair and reasonable amount towards a public enterprise, the result of which would naturally tend to further its interests by increasing its business; or why, after it has made the subscription and received the benefit of the enterprise, it should be permitted to escape its lia-

bility under the plea of *ultra vires*. All such subscriptions are matters of private judgment. The results of such an effort may be a loss or a profit, and so may be the establishment of an office and the employment of an agent. Both are ventures for business in the line of its authority, and the "*baby act*" would seem to be quite as appropriate in the one case as in the other.

But it is not necessary further to discuss the cases cited on behalf of the railway company under the point of *ultra vires*. The present case is not analogous to them in its facts, nor can it be controlled by them. Some such arrangement as was made in 1880 by the contract in question, was a necessity of the railway company's business. Elevator storage capacity in the city of Chicago, it must have as an incident of its transportation of grain in bulk. Its full authority to purchase ground (if it did not already own it) and erect thereon an elevator, which simply means a warehouse, with the usual facilities for receiving, storing and delivering grain in bulk, would not be questioned. What the capacity of such an elevator should be, would be a matter of business judgment, in view of the existing conditions, all of which would be known to the company. The grain traffic of the road, and the customs of the grain traffic in Chicago were well understood. If the railway company had built its own elevator, it would have determined its capacity with reference to these conditions. Will the court say that it was *ultra vires* of the company to make a contract with others *for the same amount of elevator storage capacity*, involving no expenditure on its part and no risks of operation? The latter alternative it adopted. By the contract it stipulated for 1,000,000 bushels of *storage capacity* in elevators properly constructed,

and this Hoyt and his associates furnished at all times, exactly as they, on their part, agreed to do. If the railway company had purchased land and erected a grain elevator with a storage capacity of 1,000,000 bushels, at an outlay of approximately at least $500,000, it would have been in no better position in respect to its grain traffic than it was and has been under the contract. The further consideration of this question belongs to another branch of the case.

Attention, however, is called to what seems to be a summary of the claim of the railway company (page 57 of brief), where it is said: "We do not claim that the "covenant of the plaintiff in error to deliver at the ele- "vators of the defendants in error all the grain trans- "ported over its lines of railways, the delivery of "which the railway company could lawfully control, is "*ultra vires*. Nor is it necessary, for the purposes of this "argument, to challenge the validity of a covenant "upon the part of the railway company, that the amount "of grain so transported should not be less than five mil- "lion bushels per annum, *but we do insist that the alleged* "*covenant of the railway company that the defendants in* "*error should receive all the grain tendered by the plaint-* "*iff in error at the elevators for storage and handling to* "*the amount of five million bushels, is beyond the scope of* "*the power of the corporation, and is, therefore, on its* "*face invalid.*"

It is respectfully but positively submitted that the italicized part of the above quotation from the argument of counsel imports a misinterpretation of the contract here involved.

The railway company stipulated for a storage capacity of one million bushels. Hoyt and his associates agreed to

furnish that storage capacity for the accommodation of the grain business of the railway company, and to operate it, and to take care of the grain brought by the railway company to the elevators for handling and storage to the full extent that the 1,000,000 bushels of storage capacity would accommodate it. The grain was to be handled in the usual and customary way of handling grain in Chicago elevators.

As will be hereafter shown, the history of the grain trade in Chicago has demonstrated that in the usual course of that trade, a *storage capacity* of 1,000,000 bushels had been ample provision for the handling and storing of more than 5,000,000 bushels per annum. The stipulation and agreement, in effect, was that if Hoyt and his associates would furnish, and operate at their own expense, elevators having a storage capacity of 1,000,000 bushels for the accommodation of the grain business of the railroad company, the company would guarantee that *by means of that storage capacity*, Hoyt and his associates should have the storage and handling of 5,000,000 bushels per annum, and if less than that amount during any year, the company would pay to Hoyt and his associates one cent per bushel upon the deficiency; all settlements to be made at the end of each year.

The subject of the contract was the providing of a storage capacity and the operation of it for the time named in the interest of the grain business of the company. The guaranty was the inducement, or one of the inducements, for the making of the contract originally, and for the full subsequent execution of it by Hoyt and his associates. The guaranty was in the direct line of compensation agreed upon and stipulated for.

Referring to what immediately follows the above quo-

tation from the brief of counsel to the end of his point of *ultra vires*, it is suggested that it is wholly immaterial how much Hoyt and his associates made or lost by the performance of the contract on their part, independent of the enforcement of the guaranty. *Gross receipts* by them are inferable from the conditions established; but whether there was a *net profit* or a *net loss* cannot be determined from the record, and if it could be so determined, would be utterly immaterial. Such results do not even tend to determine the validity or invalidity of contracts, nor have they any bearing upon the question of *ultra vires*.

Again, at the very close of the argument under the point of *ultra vires*, it is said: "If this was the agreement "of the president of the railway company and is so ex- "pressed in the contract, then we insist that such con- "tract was *ultra vires* the corporation." To this is replied, that, *if* the contract was the contract of the president of the railway company, the late Honorable Alexander Mitchell of Milwaukee, and his *personal contract alone*, the whole action has been misconceived and was instituted against the wrong party. My reading of the contract does not lead me to suspect even that any error was committed in this respect.

## II.

Under the *fourth* division of the argument for the railway company (p. 58), it is stated as follows: "*Under* "*the admitted evidence* it cannot be denied, that during "the years 1886 and 1887, the defendant tendered for "delivery and storage at the plaintiff's elevators a quan- "tity of grain largely in excess of the capacity of such "elevators.

" The amount of grain actually received was 6,217,398 " bushels. *This amount the plaintiff in error delivered.* " AND ALSO OFFERED TO DELIVER DURING SAID TERM " 8,685,569 BUSHELS OF GRAIN THAT THE DEFENDANT " WAS UNABLE TO RECEIVE."

This last and emphasized statement is *a mistake*, and one of that class of mistakes with which I have no patience, no matter from what source it may come. The possibility that such a statement could be made illustrates the *substantial imperfection* of the record, in its failure to preserve the testimony given in the court below; and in view of this *deliberate* assertion of counsel, I again insist that by the fact of the omission of a bill of exceptions *embodying the evidence*, the record is so imperfect that this court can not and ought not to consider the propositions of law submitted below, and for the reason that the very *touchstone* of the situation is left out. The evidence, if it had been preserved, would have shown that the 8,635,569 bushels was the total of the grain tendered during the years 1886 and 1887, of which 6,217,398 bushels was received, handled and stored, and the difference between the two amounts only could not be received and handled, for the reason that the grain received from the railway company was, at the time or times of its tender, actually occupying all the storage space of the two elevators, together aggregating 1,100,000 bushels.

But, if driven to the necessity of accepting the *special findings* of the learned judge of the Circuit court, as a *substitute for evidence*, I would still insist that the statement objected to is unfair.

The *special findings* (Rec., 40) state that the two elevators, having a storage capacity of 1,100,000 bushels, were, during the years 1886 and 1887, given up to the

grain business of the railway company, and that there were received into said elevators from said company, during those years, or accounted for as so received, in the year 1886, 3,259,806 bushels, and in the year 1887, the receipts into the new elevator were 2,300,292 bushels and into the old one 657,300 bushels, making in both 2,957,592 bushels, instead of 2,950,592 as the total is expressed by mere error of addition. These two amounts, for the two years, aggregate 6,217,389 bushels received and handled during the two years, as stated in the argument of counsel. On the same page of the record, the *fifth* special finding is as follows:

*Fifth.* The court further finds, "that the plaintiffs admitted in open court, that during the years 1886 and 1887, grain was tendered by the defendant to the plaintiffs for storage, and that it could not be received for the reason that the plaintiffs' warehouses were filed; *that the grain so tendered* amounted to 8,685,269 bushels, and *that the plaintiffs never refused to receive grain from the defendant, when such elevators* had capacity to receive it within 1,000,000 bushels, and that *when the plaintiffs refused to receive further grain for storage, the defendant was notified that it occupied the entire capacity stipulated for in the contract at the time plaintiffs refused to receive the grain so tendered*, to wit: 1,000,000 bushels."

Again (Rec., 41) the *special findings* say: "That during the two years in controversy the entire storage capacity of said elevators was constantly occupied by grain received from defendant's cars, and, although the plaintiffs refused to receive additional grain tendered by the defendant during the same period, *their refusal was always based* upon the ground that their elevators were full and *contained more than 1,000,000 bushels* of grain received from the defendant."

" *That* at ONE (it should be NO) *time during the years* " *1886 and 1887 did the plaintiffs refuse to receive grain* " *from the defendant* for storage in said elevators when " there was any unoccupied space in the same and that " *some* of the grain so delivered and stored during said " years remained in said elevators so long that the " plaintiffs were unable to receive or handle for defendant, " during said years, the amount of grain contemplated by " the contract, *or the full* amount actually tendered by " defendant, *and but for this unusual condition*," etc.

It is insisted that the language of the special findings, rightly interpreted, means that the 8,686,269 bushels was the total amount *tendered* by the Railway Company for handling and storage during the years 1886 and 1887, (as was the fact) of which 6,217,398 bushels were received, stored and handled, the remainder only being refused storage etc., *because the storage capacity* which it had contracted for and Hoyt and associates had agreed to furnish, was at the time of such tender actually occupied by grain received from the company.

It may be further stated that these conditions of overcrowding were not continuous, and so the evidence, if it were before the court, would show. They occurred when, as it is called in the language of the board of trade, the market in a particular kind or grade of grain was "*cornered*," and the high prices incident to such peculative operations caused unusual quantities of grain to be sent forward, thereby making the temporary demand for storage greatly in excess of the storage capacity of all the elevators of the city. Such conditions were neither within the control of the railway company nor of the warehousemen. They were contingencies which were possible, equally within the knowledge of both parties

and for which neither would be at fault. The contract itself seems to have contemplated that the storage capacity stipulated for might be insufficient, and expressly made provision for its enlargement upon the request of the railway company, *a request, however, which was never made.*

III.

*It is insisted by the railway company that the contract is void for want of* MUTUALITY. *If this insistence came in the written form of a suggestion, it could not be admitted.* IT IS WITHOUT FOUNDATION.

The reasoning upon this branch of the case by the counsel for the railway company has been and is, *that each article of the contract* of February 18, 1880, *was of itself a separate contract.*

Waiving all forms of expression not courteous to counsel on the other side, and their position now under review, it is respectfully suggested that the contract of February 18, 1880, is one of *mutual covenants*—the covenants on the one side *in their totality*, being the consideration for the covenants on the other side *in their totality*—and that this predominating feature of the contract is plainly and conclusively expressed in the eighth article, upon which the breaches in this case have been specially assigned. The *eighth* article opens with the words "In "consideration of the agreement aforesaid, the said party "of the first part (the railway company) agrees that the "total amouut of grain received at said elevator shall be, "at least, five million bushels, on an average, for each "year during the time of this lease," etc. (Rec., 6.) At

page 37 of the record, the same section 8 of the contract is set out, *in the findings of the court*, and *elevators* instead of *elevator* is used. It may be assumed that the plural word is the right one, as it best harmonizes with the scope of the contract.

The argument of counsel for the railway company strikes out of the eighth article the first clause of it, viz.: "*In consideration of the agreement aforesaid*," and proceeds as though that clause was not there. It dismembers and emasculates the whole contract, and reduces it simply to a series of propositions, disconnected and, *separately*, incomplete. If this is a sensible construction of it, I admit again, that the result of my client's case is seriously imperiled. BUT IT IS NOT SENSIBLE, NOR IS IT FAIR OR HONEST. There is no idea of *equality* of consideration involved in the word *mutuality*, as used in the law; and even if there was, there is nothing in this record which even tends to show that the covenants of the contract in question were not both *mutual* and *equal*. At the time it was signed the contract was entirely executory. *It was a contract of covenants*—the covenants on the one side being the consideration for those on the other side. As time elapsed it became executed as to the past, but remained executory as to the future. *Each year of its duration was a period in its execution, to be considered settled up and closed by itself.* SUCH WAS THE STIPULATION OF THE PARTIES, plainly written into the eighth article, and which cannot be eliminated. When Hoyt and his associates had built the new elevator and set apart its *storage capacity*, and the *storage capacity* of the old elevator, *for the use and accommodation of the grain business of the railway company*, supplied with a working force for receiving and handling the grain that could be accommodated there,

they had performed a large part of their contract, the influence and effect of which extended over the whole life of the contract. The construction of the new elevator and the setting apart of the 1,000,000 bushels of storage capacity for the use of the railway company and the accommodation of its grain business, were such acts of Hoyt and his associates *in execution of this contract* on their part, as spread themselves, *by force of the language employed*, over the entire period covered by the contract, *upon the question of mutuality of covenants and obligations.* Their future obligation was to keep the same storage capacity for the use of the railway company, and supplied with a sufficient working force to handle the business which could be accommodated by means of it, in the usual way of conducting the business of receiving, storing and handling grain in Chicago by means of grain elevators. And all this they did; for it is a part of the *special findings* of the Circuit court, that the two elevators were exclusively set apart and used for the grain business of the railway company during the years 1886 and 1887.

To the authorities cited by counsel upon the point of *want of mutuality* considered by themselves and in their proper relations, there can be no objections. The sufficient answer to all of them is, that they have no application here.

Counsel for the railway company seem to have confused the legal distinctions between *entire* and *severable* contracts, and their effort in this direction leads to the assertion (page 32): "Section 8 is an independent contract "between the parties, intended to be a guarantee of the "amount of grain that should be received at such elevators for storage, etc." And again on page 33, after referring to section 3 of the contract: "These are all

"*separate* agreements or contracts, no one of which is "dependent upon the other."

That the contract in question is divided into *separate* articles or sections is admitted. That the separate articles or sections are *separate* and *independent* contracts, is denied. That the contract is *severable for remedial purposes* lies at the very foundation of the present proceedings, which were begun pending the complete execution of the contract. *Settlements and payments were to be made annually and the contract was for ten years.* An *entire* contract is a contract for a completed work for an *entire* consideration. A *severable* contract is one under which compensation may be demanded and recovered *in parts*, as the work progresses, upon stipulations appropriate for that purpose. In the one case the *entire* work must be completed, before the right to any part of the compensation can accrue; in the other the right to compensation accrues as the work advances. The question of *entirety* or *severability*, *divisibility or indivisibility*, *is a matter of remedy*, *dependent upon express stipulation or necessary intendment*, in nowise involving the *mutuality* of the contract in its general scope. This may not be a text-book definition of the distinctions referred to. It, perhaps, is not complete, as a result of a careful review of all the jargon of *conflicting opinions*, full of *judicial dicta*, put forth in opinions of courts and *quoted* in what are denominated "*Text Books of the Law.*" The *sensational* proclivities of human nature, however commendable they may be are an uncertain test of legal right, in a civilized society. The definition, so far as it goes, is sufficient for the present case. It has, at the least, the merit of certainty and possibility of intelligent application. And in this connection it may be stated, that the view of the sit-

uation, taken by the counsel of the railway company, wholly ignores a substantive part of the eighth article of the contract, viz: "but in case it shall afterwards ap- "pear, that the total amount *received* up to that time "equals or exceeds the average amount of five million "bushels *per annum*, the amount so paid to the party of "the second part *shall be refunded, or so much thereof as* "*the receipts for the year* shall have exceeded five million "bushels, etc."

This signifies, in the plainest possible language, not only the right to *annual* settlements and payments, but also an obligation on the part of Hoyt and associates to refund to the railway company moneys, it may have paid on account of *differences*, and to the extent that the business in any future year should exceed the guaranteed amount of 5,000,000 bushels. And yet, on page 34 of the argument, counsel, somewhat changing their ground, say: "It therefore follows that if section 8 is an inde- "pendent contract between the parties, it must, of neces- "sity, contain all the requisites of a valid contract, else it "cannot be enforced against either party. There must "be a good consideration for the promise or agreement "of the defendant. The rule is elementary."

The *if* is important in the *application* of the doctrine of the law insisted upon, even though the doctrine of the law should be admitted.

But further on in the argument, and on the same page, counsel say: "The consideration may be good, *if ap-* "*preciable or beneficial.* The only consideration for the "agreement upon the part of the defendant is expressed "to be 'in consideration of the agreement aforesaid.' "We have already shown that the defendant can derive "no *special benefit under this section* of the contract, or

"any other section of the contract, unless it be from the "payment of the rental, and this can only be held to be "a consideration for the lease executed by the defendant. "*The elevator was built in the interest of the plaintiffs* "*themselves, was owned and operated by them, and the* "*right of user and occupancy remained wholly in them*," etc.

Waiving, again, for present purposes, the substantial imperfections of the record, I may respectfully inquire, do these quotations from the *principal propositions* of counsel for the railway company, harmonize with the exact and controlling provisions of the contract sued upon and which are before the court for interpretation? Leaving out the *ifs* let us take one or two sentences of the argument as illustrations.

In the first place, it is not necessary that the consideration for a covenant, in order to be good, should be either *appreciable or beneficial* to the covenantor. *It is sufficient* if a responsibility, an expenditure, an obligation, a duty or deprivation results therefrom to the covenantee.

Take as an illustration the case of *Hamer* v. *Sidway*, 124 N. Y., (Sickles, 79), 538. The case was an extreme one. An uncle agreed with his nephew, that if he would refrain from drinking liquor, using tobacco, swearing, etc. until he became twenty-one years of age, he would pay him $5,000. The contract was sustained by the New York court of Appeals against the representative of the uncle's estate. Many authorities are referred to in the briefs of counsel on either side. PARKER, J., summarizes the conclusion of the court on the question of consideration, when he says (page 546):

"Consideration means not so much that one party is

"*profiting*, as that the other abandons some legal right "in the present, or limits his freedom of action in the "future, as an inducement for the promises of the first."

This summary is well supported by the references made on page 545 of the report.

The assertion that "the defendant can derive no spe- "cial benefit under this section," (Sec. 8) ,"or any "other section of the contract, unless it be from the pay- "ment of the rental," etc., it is unnecessary to comment upon; but the last clause of the quotation deserves a brief attention, viz: "The elevator was built in the interest "of the plaintiffs themselves, was owned and operated by "them," etc.

Is this a fair statement of the effect of the contract, when it appears *upon the very face of it*, that Hoyt and his associates obligated themselves to build the new elevator, and to hold its storage capacity and the storage capacity of the old and adjoining elevator to the extent of 1,000,000 bushels for the *exclusive use* of the grain business of the railway company, or *to supply the same amount of storage capacity elsewhere for the same use at their own expense?*

It is transparent on the face of the contract, that the rental to be derived from the leasing of the lots *was not the purpose* which the railway company had in view.

This could as well have been secured by a simple lease *and without any of the complicated provisions*, outside of an ordinary lease, which the contract contains. The statement, and I might appropriately add the whole argument, of the counsel for the railway company *misses and intentionally avoids* THE REAL PURPOSE of the parties in the making of the contract. *The scope of the agreement was*

*that Hoyt and his associates should furnish to the railway company 1,000,000 bushels of grain storage capacity, and operate it at their own expense.* It cannot be pretended, even upon the present record, defective as it is, that they ever failed in the performance of that agreement.

But in addition to this, by the very terms of the eighth section of the contract, the railway company provided for a *refunding* from year to year of any moneys it might have previously advanced on account of deficiencies, in case the amount of grain received into the elevators, during such subsequent year, should exceed 5,000,000 bushels. The argument of the counsel for the railway company makes no note of this provision. *All the interlacing provisions of the contract are studiously put out of sight.* I cannot assume that the court will treat the contract in that way.

The argument of the counsel for the railway company seems to run together the two objections of *want of mutuality* and *want of consideration*, and I have followed their leading in that respect; but there is another question, started by the argument, under cover of a suggestion, that the contract, as the parties made it, *is impossible of execution and therefore void.*

## IV.

### THE CONTRACT SUED UPON WAS NOT ONE OF THAT CLASS OF CONTRACTS WHICH IN THE LAW ARE DENOMINATED CONTRACTS IMPOSSIBLE OF EXECUTION.

There is a class of contracts which *professional cranks* may enter into, denominated *contracts impossible of execution and therefore invalid.* For instance a man agrees to

go to the moon and return, reporting its physical condition, or to go from New York City to London and return in two days. The physical possibilities, so far as developed, stamp upon such a contract the impress of *impossibility of execution*. The *known* conditions are opposed to the *possibility*. The contract before the court is not one of that class; nor does it approximate even in its conditions the elements which the law defines *as contracts impossible of execution*. In this connection it is admitted, of course, that 5,000,000 bushels of grain cannot *at one time* be stored in 1,000,000 bushels of storage capacity. The contract does not stipulate for this *impossibility*. The contract in itself is a business arrangement, entered into in view of the business situation. Either party might lose or gain as the result of it. The result in this respect, the court does not know and, *therefore*, cannot consider. In this connection I make note of the decisions of the *Appellate court* of Illinois hereafter to be referred to, quoted from in the argument of the counsel for the railway company, and reproduce a sentence from my argument in that case, viz: "It is quite immaterial, for the purpose of a "pleading, whether the court can or cannot declare what "the intent of the parties was *as to the manner in which the* "*performance of the covenant was practicable*. If I should "put the matter a little more pointedly, I might say it is "no business of the court to inquire *how or in what man-*"*ner* the parties to an ordinary contract expect or intend "to make that contract available to themselves." There is not one word of this quotation which, upon further consideration, I would strike out.

The argument of counsel in support of the objection that the contract was impossible of execution, runs somewhat in this way. "Five millions of bushels of grain can-

"not, *at one time*, be stored and handled in a *storage capacity* "of one million bushels. Neither the railway company "nor the warehousemen control the length of time grain "shall remain in store. If, therefore, the railway com- "pany by grain actually delivered and stored is occupy- "ing the entire 1,000,000 bushels of storage capacity, "*and the owners of the grain* do not remove it in time to "make room for other deliveries, then it becomes impos- "sible for the warehousemen to receive such further de- "liveries, and the contract becomes *impossible* of execu- "tion."

The argument rests upon a false construction of the contract in this, that it assumes that the warehousemen (Hoyt and associates) agreed to store and handle *all* the grain tendered to them for that purpose by the railway company, even though the company should be occupying, or rather the grain delivered by it should be occupying, all the storage space which the company had stipulated for, and Hoyt and his associates had agreed to furnish for its use. *This is a serious misapprehension.* The contract will not bear that construction. *The contract is* (*and this is repetition*) *that Hoyt and his associates should keep and operate for the use of the grain business of the railway company, 1,000,000 bushels of storag e capacity and the guaranty is that from the use of that 1,000,000 bushels of storage capacity, so reserved for the use of the railway company, Hoyt and his associates should, during each of the ten years, receive the benefit of the storage and handling of 5,000,000 bushels of grain.* Not 5,000,000 bushels at one time, nor any bushels in excess of 1,000,000 bushels at one time, but that the quantity of grain *annually* received for storage and handling, should be 5,000,000 bushels.

The railroad company did not contract for, nor did the warehousemen agree to furnish for its use, anything beyond the *one million bushels of capacity*. When that capacity was actually occupied with grain received from the railway company, it would necessarily be compelled to find storage for additional grain elsewhere, and at its own expense.

It may have made a mistake in not providing for a larger elevator and more storage capacity. If so, it was its own fault, and not the fault of Hoyt and his associates. The *quality* of the contract which it did make cannot be affected by any such considerations.

The contract provides that the business of receiving and handling the grain shall be conducted in the usual way of conducting such business in the city of Chicago. In the *special findings* of the Circuit court, it is stated (Rec., 43):

"One of the plaintiffs testified that in a single year he "had received and stored in an elevator of less than one "million bushels capacity, *ten million bushels of grain*."

On the same page of the record, that during the period covered by this suit, viz: the years 1886 and 1887, *the entire storage capacity of the two elevators*, that is, the new one on lots 3, 4 and 5, and the old one on lots 1 and 2, *was in use by and for the railway company alone, and that the management of the elevators never refused to receive and store grain tendered by the railway company, except when their storage capacity was fully occupied.* But, upon this question, it is admissible to look for *common and public* information, outside of the record.

The reports of the railroad and warehouse commissioners of Illinois, are *public records*, published by state

authority, and may, therefore, be considered by the court. The report of the commission for the year 1879, contains the report of the chief inspector of grain at Chicago, dated November 1st of that year. (Page 273, *et seq.*) Exhibit O of the inspector's report shows, that for the year prior to that date, there were, "*according to inspec-*" *tion*," received at Chicago, by railroad 108,724,690 bushels of grain, and by canal and vessels 6,985,367 bushels, in all 115,710,057 bushels. Exhibit F of the same report (page 281), shows the storage capacity of the Chicago elevators, during the same time, to have been 15,850,000 bushels. This report does not show, that all the grain received at Chicago, during the year covered by it, passed through the Chicago elevators. If it should be assumed that it did, the amount stored and handled by the elevators would be at the rate of about 7,000,000 bushels for each 1,000,000 bushels of *storage capacity*.

The report for the year 1880 is more explicit in this respect. That report is dated October 31, 1880, and at page 530, states that "the aggregate amount of all kinds " of grain received into store in the *public warehouses* of " this city " (Chicago), " during the year, is 107,347,715 " bushels." This is from the registrar's report which is made a part of the report of the commission. *Exhibit G*, which is a part of the registrar's report, states the storage capacity of Chicago grain elevators of *class A*, that is, *public warehouses* (so called), to have been, at the date of the report, 17,820,000 bushels. This shows a storage and handling of grain in Chicago elevators for the year ending October 31, 1880, of upwards of 6,000,000 bushels for each 1,000,000 bushels of storage capacity.

These facts, which are undisputed, illustrate that the parties were contracting together upon a basis well recognized and established, and in view of a situation, the elements of which were a part of general information, and, therefore, presumably well understood, viz.: that in the usual course of the business of storing and handling grain by means of elevators in the City of Chicago, 1,000,000 bushels of *storage capacity* was a sufficient provision for the storage and handling of 5,000,000 bushels and upwards *annually*. Of course, *in emergencies*, such, for illustration, as may grow out of what is called by Board of Trade men "*a corner*" on grain of any kind or grade, the demand for storage capacity in Chicago elevators might be overtaxed. *This contingency* was equally within the comprehension of the parties to the contract, and yet no special provision was made for it. The results of all overcrowding of storage capacity were therefore left to *possible provisions*, by either party, *outside of the contract*, as their respective interests might seem to require. The contract itself covers no such contingency and, *therefore*, if, *whilst the grain received from the Railway Company* was occupying the full storage capacity of 1,000,000 bushels, which Hoyt and his associates had agreed to furnish, it should tender for storage another 1,000,000 bushels or any part thereof for like storage, Hoyt and his associates, or those representing them, could not, under and by virtue of the contract, be required to furnish storage for one bushel of the surplus grain thus tendered to them; and their refusal to receive it would be no violation of their agreement. *By the contract itself*, the warehousemen (Hoyt and his associates) are relieved from any and all responsibility in respect to such tenders of surplus grain. Is there anything in the nature of *legal*

*impossibility*, connected with the carrying out of an ordinary business contract, or the guaranty of the results of such a contract? It may involve the payment of money. In the present case it is, however, more a matter of *disinclination* than of *impossibility*.

Whilst it is not appropriate to review all the authorities referred to by counsel for the railway company, attention may be called to the citations made on pages 43 and 44 of their brief. The paragraphs containing these quotations seem to summarize their argument.

With the quotations from "Parsons on Contracts," and from "Pollock's Principles of Contracts," I have no quarrel. That there may be a contract *in form*, which the law will pronounce *impossible* of execution, has already been conceded. *The contract in this case is not one of that class.* Nor has the performance of it brought it within the range of the principle of the law, which says: "If the "performance of any promise becomes impossible in fact "*by the default* of the promisee, the promisor is dis- "charged." It is not necessary to *repeat* the provisions of the contract and the conditions of its execution in order to verify this statement.

But reference is made on the pages above noted to the decision and opinion of the "*Appellate court of Illinois.*" I beg the court not to confuse this court with the "*Supreme court*" of the state. It is true that a case based upon the same contract here involved, but covering a later year of the operations under that contract, has been before the "*Appellate court of Illinois.*" In that case damages were assessed and judgment rendered upon the overruling of a demurrer to the declaration substantially like the declaration in the present case, and the Appellate court reversed the judgment, *for what reason no sensible man can tell.*

The law of the state under which that court was organized, and which is still in force, established the *judicial respectability* of the court, and stamped an impress upon its opinions which experience has, in large measure, justified. The 17th section of the original Appellate Court Act (Sec. 37 of Chap. 37 of the revision of Ill. Statutes, by Starr & Curtis, page 703), provides that in case a judgment shall be reversed by that court, "it shall "briefly state in writing the reason for such reversal and "file the same with the files in said cause; PROVIDED, "*that the reasons so filed shall not be of binding authority* "*in any cause or proceeding other than that in which they* "*may be filed or given.*" The court has exerted its utmost capacity to deserve the legislative estimate of its prospective opinions.

It is true the learned counsel attempt to break the force of the *impropriety* of citing the case from the *Appellate court* by saying (page 45): "We do not cite the "judgment of the Appellate court as an authority in this "case." *Why then cite it at all*, unless it may be to provoke me to say something, which I will not say, by way of reply to the suggestion that "*the opinion was written* "*by a judge of great ability and long experience upon the* "*bench.*"

It is not surprising that counsel for the railway company attempt to support their case by all the broken reeds and unsubstantial straws which float in their direction. A better case would not require such adventitious aid; but if the learned counsel mean to adopt *as their own* the opinion of the *Appellate court* of Illinois, which they do not venture to do, a different condition would be presented. The statement of an opinion, which is *by law* made incompetent as an authority, cannot be made *re-*

*spectable* except by the endorsement of counsel. But waiving this, and assuming that counsel intended to indorse the quotation from the opinions of the Appellate court judge, the case is confronted with this condition:

It would seem to be insisted *that the declaration should aver a willingness, readiness and ability on the part of Hoyt and his associates* to receive, handle and store 5,000,000 bushels of grain per annum, *no matter how or when it should be tendered* for storage by the railway company. Such an averment, if made, would be a substantial part of the plaintiff's cause of action. Such an averment could not be, and cannot be made *truthfully*, as the record shows. I will not put into the declaration of a cause of action *an averment which is not true*. It could not be *truthfully* averred that the appellees were *at all times* ready and willing to receive, handle and store, *in and by means of the 1,000,000 bushels of storage capacity, which they had* agreed to furnish, all the grain tendered and as and when tendered by the railway company, to the extent of 5,000,000 bushels per annum. If such an averment under the contract is necessary to the statement of a complete cause of action, there is nothing in my client's case; for whilst the averment could be easily made, as a matter of pleading, yet, if made, it would not be true, and, therefore, the action would necessarily fail for want of support.

In this respect the case comes back to the position it held when Judge Blodgett passed upon and overruled the demurrer to the declaration. And here again we reach the old question, triangulated from many points of view by the learned counsel for the railway company, and the visual results of such triangulations pictured forth in words of photographic imitation and with much display of learning.

And yet, after all the effort made, and the wisdom of counsel and courts has been exhausted, the simple and only question is, *what does the contract mean?*

Imagination might place the counsel and the Appellate court of Illinois in the position of poring over the provisions of the contract here before the court, as Pickwick and his followers did over the inscription upon the fragment of a stone discovered at Dingley Dell, which, after exciting the curiosity and taxing the capacity of learned antiquarians, was translated by Mr. Blotton, *with a little assistance from the man of whom the stone had been purchased*, as meaning simply, "BILL STUMPS—HIS MARK."

Dickens' opinions are not hampered by any legislative restrictions. He reached the solution of an apparently very complicated controversy by the aid of a small amount of *personal knowledge* and some exercise of *common sense*. If the court or counsel should say of me that I have been following this *ignis fatuus* of *cynical* criticism upon plain language, through many pages of argument, I would plead guilty to the charge—I have been led into it. It does not belong to the case except by way of reply.

## V.

THE DECLARATION IS A SUFFICIENT STATEMENT OF A CAUSE OF ACTION TO SUPPORT THE FINDINGS AND JUDGMENT OF THE CIRCUIT COURT.

Interspersed, *here and there*, through the argument of counsel for the railway company, are intimations predicated upon some magical or cranky view of the contract, in correspondence with the opinion of the "Illinois Appellate Court," that the declaration does not state a good cause of action.

This question was necessarily and as a matter of fact passed upon by Judge Blodgett, when he overruled the demurrer to the declaration, and afterwards by Judge Gresham, when he overruled the objections of the counsel for the railway company to his findings and directed judgment to be entered upon those findings. It may be that a declaration could be more artistically drafted, and that greater caution could have improved its phraseology. For present purposes, it is sufficient to say, that the declaration sets out the contract sued upon in full, and avers complete and exact performance of all the covenants and conditions on the part of the plaintiffs below to be kept and performed, and in regular form assigns a breach or breaches of covenant on the part of the defendant. The contract is set out in full in one count, and according to its tenor and effect in the other, and the breaches, in substance, are (the fourth and fifth breaches being withdrawn) that although the plaintiffs performed all their covenants and reserved and kept for the use of the defendant in these elevators the full storage capacity of 1,000,000 bushels, yet they did not receive and handle during the said years 1886 and 1887, by means thereof, the guaranteed average of 5,000,000 bushels per annum, the deficiency for the two years being 3,782,602 bushels, on account of which and at the stipulated rate of one cent per bushel, the defendant became liable to pay to plaintiffs the sum of $37,826.02. The amount of the judgment was reached by allowances of interest and the deduction of rentals, and in these calculations no mistake is suggested.

The court will still bear in mind that the case was tried upon what I have denominated *open issues*, the only plea being the plea of general performance, with liberty, under

that plea, to introduce all defenses which could properly be pleaded specially. It has been insisted by counsel for the railway company that the declaration was defective, for the reason that it did not aver, that the average amount of grain received into the elevators during the years preceeding the year 1886 did not exceed 5,000,000 bushels per annum. The reply to this is, that the contract itself provided for annual settlements and payments, and if there was any surplus carried over for the previous year, that was a matter of defense, or in reduction of damages by way of set-off. No such claim was made upon the trial of the case, and, therefore, it must be conclusively presumed that no such claim existed.

Again, it has been and is urged by the counsel for the railway company that the stipulation to pay one cent per bushel upon the annual deficiencies was a *penalty*, and not in the nature of stipulated damages. This view of the situation is untenable. The plain reading of the covenant is against it, and discussion and illustrations cannot make it plainer.

It may be that I have in these pages overlooked some special argument or suggestion of the counsel for the Railway Company. If so, it may be safely left to the oral discussion, or better, perhaps, to the judgment of the court. The general scope and effect of the contract, I have endeavored to explain, giving to each section of it its proper relations to and bearing upon all the other sections. The business conditions existing at the time of the execution of the contract, so far as they might affect the reasons and purposes of the parties for entering into the contract, I have endeavored to consider with fairness, and with a view of making clear the meaning of its several provisions, and their adaptation to the circumstances of

the parties, and the purposes which they were mutually desirous of accomplishing; and in conclusion, it is now respectfully submitted that there is no error in the record and judgment of the court below, and that the judgment appealed from must be affirmed.

JNO. N. JEWETT,
*Att'y and of Counsel for Appellees.*

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Office Supreme Court U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, A. D. 1892.**

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
*Plaintiff in Error,*
*vs.*
ALFRED M. HOYT, THEODORE I. HUSTED, LEONARD HAZELTINE AND G. D. DUNLAP, SURVIVORS OF JESSE HOYT AND PERRY H. SMITH, DECEASED, FOR THE USE OF MUNGER, WHEELER & COMPANY,
*Defendants in Error.*

**No. 180.**

## BRIEF OF PLAINTIFF IN ERROR IN REPLY.

JOHN W. CARY,
OF COUNSEL.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, A. D. 1892.**

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*Defendants in Error.*

**No. 180.**

## BRIEF OF PLAINTIFF IN ERROR IN REPLY.

This action arises on a contract made between the parties in 1880. The defendant is a railway company engaged among other things in transporting wheat from the north-west to Chicago. The plaintiffs were elevator men engaged in elevating and storing wheat and other grains in Chicago. The defendant, with a view of procuring elevator and storage facilities at Chicago for the grain it might transport, entered into this contract, by which plaintiffs agreed to build a new elevator, adjacent to one already owned by them, which together, would have a storage capacity of over one million bushels. The de-

fendant agreed to lay all necessary tracks adjacent to said elevator to connect its railway therewith, for the purpose of delivering grain in cars thereto, and further agreed for the term of said lease, which was ten years, " to deliver on said tracks, in cars, at said elevator, to " the party of the second part, all the grain that may be " brought by its railway consigned to parties in the city " of Chicago, so far as it can legally control the same for " handling and storing in said elevator."

The plaintiffs agreed to receive, handle and store said grain as delivered in the usual manner of handling grain in the city of Chicago, to the extent of the capacity of said elevator so to be constructed, and in addition agreed that they would use for the same purpose, so far as their other engagements would allow, the elevator now (then) constructed, and that said defendants should at all times be entitled to storage for its grain to the extent of at least one million bushels. Plaintiffs were also at liberty to receive grain from other parties at said elevators. The eighth article of said contract further provided " in con- " sideration of the agreement aforesaid, the defendant " agrees that the total amount of grain received at said " elevator shall be at least five million bushels on an " average for each year during the term of this lease, " and in case it shall fall short of that amount, the said " defendant agrees to pay to the said plaintiffs one cent " per bushel on the amount of such deficiency," etc.

The only breach of the contract assigned in this action is based on this eighth article.

The plaintiffs claim that during the years 1886 and 1887, they received into said elevator for storage, only 6,217,408 bushels, instead of 10,000,000, and that in consequence they are entitled to receive one cent per bushel

for 3,782,592 bushels, the difference between the amount actually received, handled and stored in said elevators by them, and the stipulated amount of five millions per annum to be received at said elevators.

The plaintiffs insist upon reading said article 8 as if the defendant thereby guarantees that the plaintiffs *will annually receive into said elevators and handle and store 5,000,000 of bushels* of grain per annum, regardless of their ability, or disposition to receive, or handle the same when tendered to them.

In other words, the plaintiffs claim that the true construction of said article 8 to be, that, if the plaintiffs do not receive five millions of bushels per annum into said elevators to be handled by them, that they are entitled to recover one cent per bushel for the deficiency, regardless of all other facts, circumstances and conditions producing such result, claiming that the plaintiffs failure, not the defendant's, was to fix and determine the defendant's liability to pay said sum. No default of defendant is claimed, alleged or relied upon as the basis of this action, but it is insisted that for the plaintiffs failure, the defendant is fixed in liability, and must pay that amount of money. It is not pretended that plaintiffs failure was in any manner caused by any act or default of defendant, yet it is gravely insisted, that this contract provides that for this failure of plaintiffs, defendant must respond in this amount of damages.

This brings us to the consideration of the meaning and construction of said article 8. The defendant insists that said article can have no such construction as the plaintiffs claim. As construed by the plaintiffs, we insist, as has been ably argued by my associate, it is invalid:

handling and storage in said elevators, the plaintiffs, agreeing to receive, handle and store said grain as delivered in the usual manner of handling grain in the city of Chicago, to the extent of the capacity of said elevator to be constructed, and in addition to use for the same purpose, the elevator already constructed, so far as their other engagements would allow, and that the defendants should at all times be entitled to storage for its grain to the extent of at least one million bushels. Grain was to be received by the plaintiffs from other parties, but not so as to interefere with the plaintiffs "and in consideration of "the agreement aforesaid, the said party of the first part "agrees that the total amount of grain received at said "elevators shall be at least five million bushel on an aver-"age for each year during the term of this lease, and in "case it shall fall short of that amount, the said party of "the first part agrees to pay to the said party of the sec-"ond part, one cent per bushel on the amount of such de-"ficiency," etc.

Prior to the making of this contract, the shipping point for grain transported by the defendant had been at Milwaukee, where the defendant for many years had been, and then was, the owner of extensive elevator facilities, exceeding in amount four million bushels. Its road had then lately been extended from Milwaukee to Chicago, and the object of this contract was to secure facilities for the handling and storage of grain that it might bring to said city in the course of its business.

The plaintiffs were well aware of the situation of the defendant's road and its business, and that prior to that time its grain had been elevated and stored in its own elevators at Milwaukee, and that the defendant's interests would be best subserved by continuing to deliver

1st. As being without mutuality.

2d. Impossible of performance, and,

3d. As a wagering contract and *ultra vires* of the defendant. While, as construed by the defendant, it is, perhaps, a proper contract, practicable in its nature, possible of performance, and within the scope of the defendant's powers to make, but insufficient, when the facts of the case, as found by the court, are applied to it to sustain a recovery.

Before attempting to construe the contract, let us consider for a moment the condition of the parties at the time of making it, and the objects to be accomplished thereby.

The plaintiffs were elevator men, engaged in receiving and storing grain brought to the city of Chicago. The defendant was a common carrier, engaged, among other things, in transporting grain from the country to said city. The plaintiffs were desirous of increasing their business at that place, and the defendant desired to secure suitable and proper elevator and storage facilities for the grain that it might transport. The plaintiffs were the owners of an elevator of about 350,000 bushels capacity in Chicago, on the line of the defendant's railroad. They proposed to construct another elevator, adjoining it for use in receiving and elevating the grain that might be brought to Chicago by the defendant and others. The defendant, on its part, agreed to lay all necessary tracks adjacent to said elevators, to connect its railway therewith for the purpose of delivering grain in cars thereto, and keep the same in repair, and for the period of ten years to deliver on said tracks in cars at said elevator to the parties of the second part, all the grain that might be brought by its railway consigned to parties in the city of Chicago, so far as it could legally control the same for

handling and storage in said elevators, the plaintiffs, agreeing to receive, handle and store said grain as delivered in the usual manner of handling grain in the city of Chicago, to the extent of the capacity of said elevator to be constructed, and in addition to use for the same purpose, the elevator already constructed, so far as their other engagements would allow, and that the defendants should at all times be entitled to storage for its grain to the extent of at least one million bushels. Grain was to be received by the plaintiffs from other parties, but not so as to interefere with the plaintiffs "and in consideration of "the agreement aforesaid, the said party of the first part "agrees that the total amount of grain received at said "elevators shall be at least five million bushel on an aver-"age for each year during the term of this lease, and in "case it shall fall short of that amount, the said party of "the first part agrees to pay to the said party of the sec-"ond part, one cent per bushel on the amount of such de-"ficiency," etc.

Prior to the making of this contract, the shipping point for grain transported by the defendant had been at Milwaukee, where the defendant for many years had been, and then was, the owner of extensive elevator facilities, exceeding in amount four million bushels. Its road had then lately been extended from Milwaukee to Chicago, and the object of this contract was to secure faciilities for the handling and storage of grain that it might bring to said city in the course of its business.

The plaintiffs were well aware of the situation of the defendant's road and its business, and that prior to that time its grain had been elevated and stored in its own elevators at Milwaukee, and that the defendant's interests would be best subserved by continuing to deliver

and store its grain at that point, instead of taking it to Chicago, so far as the course of business would allow.

Under these circumstances, the plaintiffs desired an assurance from the defendant that a fair proportion of the grain transported by them should be delivered at their elevator at Chicago, and a guarantee that the elevator proposed to be constructed would have wheat delivered to it to be elevated, sufficient to warrant them in making the outlay necessary for the construction of said elevator, and with that view clause 8 was finally agreed upon.

An error of statement, or, rather, an interpolation, has crept into the record in regard to this article 8, and is several times repeated in the records and briefs in the case, which should be corrected. It consists in inserting the words "from the said party of the first part," after the word received, near the end of the second line of said article in the record (page 8), making it read: "the "total amount of grain received from the party of the "first part at said elevator," instead of "the total amount "of grain received at said elevator."

This article of the contract is correctly recited in the declaration (Rec., 8, Fol. 13), also in the opinion of Judge Blodgett (Rec., 25; Fol., 58); but the mistake occurs on page 32, and again at page 37 of the record, but in the opinion of Judge Gresham (page 42) the clause is correctly quoted.

The counsel for defendant in error in his brief has quoted it incorrectly, including in his statement the interpolated word. See his brief page 6. The plaintiffs do not charge in their declaration that there was not received in the years 1886 and 1887 on said tracks in cars at said elevator for delivery to the plaintiff, over five million bush-

els of grain in the usual manner of delivering the same, on the contrary, the court, in its finding (Rec., 40), states: "That the defendant in 1886 and 1887, so delivered "6,210,398 bushels, which was received by the defend- "ant into said elevator, and further finds as follows: "*Fifth.* The court further finds, that the plaintiffs ad- "mitted in open court that during the years 1886 and "1887, grain was tendered by the defendant to the plaint- "iffs for storage, and that it could not be received for the "reason that the plaintiffs warehouses were filled; that "the grain so tendered amounted to 8.685,269 bushels, "and that the plaintiffs never declined to receive ship- "ments of grain from the defendant when such elevators "had the capacity to receive it within a million bushels, "and that when the plaintiffs refused to receive further "grain for storage, the defendant was notified that it oc- "cupied the entire capacity stipulated for it in the con- "tract at the time plaintiffs declined to receive the grain "so tendered, to wit: one million bushels."

The plain and manifest meaning of this provision of the contract is that the defendant agreed to deliver on the tracks in cars at said elevator to the plaintiffs all the grain which they could control, consigned to Chicago over its road, and that the plaintiffs would receive said grain in the cars so delivered and elevate and handle the same in the manner usual in said business to the extent of the capacity of said elevator, the defendant agreeing that the amount of grain so delivered by it and other parties on said tracks in cars at said elevator to the plaintiffs for storing and handling should amount on an average to at least five million bushels per annum for the period of ten years, and that in case of failure on the part of defendant's so to deliver said amount of grain on said tracks in cars at said

elevator, together with what might be delivered by other parties, it would pay one cent per bushel for the amount of such deficiency, the manifest object and purpose of said covenant being to assure to the plaintiffs that there would be delivered at said elevator for storage by the defendant and other parties, a "total" amount of grain equal to five million bushels per annum, and a delivery on said tracks in cars at said elevator to the plaintiffs of all the grain which it could control consigned to Chicago, would be a full and complete performance on its part of the terms of said contract, provided the grain so delivered or offered for delivery by the defendant and others amounted to five million bushels per annum.

Constructed in this manner, the contract was a reasonable and proper one, capable of performance on the part of the defendant, to some extent mutual in its provisions, and probably within the scope and power of the defendant to make. So construed, it is an agreement on the part of the defendant to do what it had power to do, and gave to the plaintiffs an assurance of having a business to the extent of five million bushels to handle, elevate and store provided it had the capacity to do it.

The court further finds (Fol., 41), that during the two years in controversy the entire storage capacity of said elevators was constantly occupied by grain received from defendant's cars, and although the plaintiff's refused to receive additional grain tendered by the defendant during the same period, their refusal was always based upon the ground that their elevators were full and contained more than a million bushels of grain received from defendant.

There is no allegation in the complaint or in the findings of the court that the plaintiffs were ready, willing and able to receive and store said five million bushels of

grain, but on the contrary it affirmatively appears that they were not ready, able or willing to receive same, but refused it when tendered by the defendant. The plaintiffs therefore asked in the court below, and here insist, that the defendant shall be mulct in damages, not for any failure on its part to perform the terms and conditions of said contract, but for the failure or inability of the plaintiffs, to perform their part thereof, and if this judgment is sustained it must be for the fault, wrong and inability of the plaintiff, and not for any default or wrong on the part of the defendant.

The plaintiffs insist with great earnestness that by the contract they were only bound to furnish storage capacity to the extent of one million bushels, and seem to think that if they kept that article of the contract that would be a perfect and complete compliance on their part of all the obligations of the contract. That article would be a complete protection to plaintiffs against an action by defendant for not furnishing all the storage necessary for its business, or for the five million bushels, but is available for no other purpose whatever. It has no bearing upon the question here involved. The right of plaintiffs to demand the delivery of five million bushels of grain, or compensation for failure, is based upon the mutual obligation arising out of the contract that if furnished the plaintiffs would receive, elevate and store the same. So far as the questions here involved, are concerned, the contract must be read as though it was expressly stipulated that plaintiffs would receive, elevate and store five million bushels, and their inability to do so is a complete defense to any right to claim damage for such failure. In this case the grain was tendered and refused, as the plaintiffs claim, from their inability to receive and store it, not

from any default of defendant, but wholly from the inability of defendant. This inability of plaintiff to perform the obligation necessarily arising out of their contract is no excuse for their non-performance of an obligation of the contract upon which plaintiff's claim in this case is based.

The breach of the contract assigned is not that the defendant failed to deliver on said tracks in cars at said elevator to the plaintiff all the grain brought by it to Chicago, or that the grain so delivered did not amount to five million bushels per annum. But the breach, and only breach, assigned is that the plaintiffs did not receive into said elevators the amount of grain stipulated. That was their fault, misfortune or want of ability, and not the fault of the defendant. It is not charged that the full amount of grain required in each year was not delivered in cars on the tracks at said elevators to the plaintiffs in the usual form of delivery. Delivery of grain to elevators in all cases is made by delivering the grain on the tracks in cars at the elevator for the purpose of elevating and storing by the parties in charge of the elevator, and it is respectfully submitted that the delivery of five million bushels per annum of grain in that manner was a full compliance with the guaranty or agreement of the defendant as contained in article 8 of said contract.

In an action between these same parties on this contract in the State of Illinois the Appellate court, in construing this language, says: "Now, it is quite clear that "the covenant of the company that the total amount of "grain received at said elevator shall be at least five "million bushels," means, and is to be read, as if it were written with the words "brought to, in readiness to be," or equivalents, inserted before the word "received."

The only legitimate and proper use of a guaranty such as that stated in the eighth article of the contract, was to assure the plaintiffs that the elevator that they were about to build would have suitable support and a proper amount of business to transact; not that they would transact it. The proper province of such a guaranty is, that sufficient business should be offered or tendered to the party to make the investment a profitable one. The attempt to torture this provision into an agreement by the defendant that the plaintiff should do a certain amount of business is not warranted by the language used, and if such intention were expressed in plain, unmistakable language, it would be void as impossible of performance by the defendant. The defendant could not make a legal covenant or agreement that the plaintiff should or would do any particular thing for the plain reason that it had and could have no control over the action of the plaintiffs, and if such a contract had been entered into, it would have been manifest to both parties thereto, at the time that it was one impossible for the defendant to perform, and, therefore, void, but it was possible for the defendant to guarantee to the plaintiff that any particular act or transaction within its power to perform should take place. It could, therefore, agree that five million bushels of wheat per annum should be delivered at said elevators in the manner usual in such cases. It might have to buy the wheat in order to have it so delivered, but that would not render the contract impossible, and would not require the action of any other party to co-operate in its performance; but when it is attempted to provide by way of guaranty by defendant, that the plaintiff's should do any particular act in regard to the wheat so delivered, it was passing beyond the power of the defendant to perform, because the voluntary

action of the plaintiff must co-operate in the performance of any act by them in relation to said wheat. It was, therefore, impossible for defendant to covenant and agree that the plaintiff should receive five million bushels of wheat into said elevator, and if such is the construction to be put upon the contract, then the argument of my associate that the contract was void as impossible of performance is unanswerable, and was known to be void by both parties at the time it was entered into.

The only legitimate object of such a contract is to guarantee the opposite party an opportunity of profit in the undertaking in which he is about to embark, and so construed, the covenant in and by its terms implies that the plaintiffs would receive and store the grain so delivered, and any failure on the part of the plaintiff to perform his part of the covenant to receive and store would satisfy the defendant's covenant to that extent the same as actual performance, and the plaintiffs, in order to avail themselves of such a covenant would have to allege that they were ready and willing to receive and store the said five million bushels as provided in the agreement. As said by the Appellate court in the case between these same parties above cited, "But there is no special aver- "ment that they were ready and willing to do what the "covenant on which the breach is assigned implies that "they were to do, to make the performance of that cov- "enant by the company, possible. Contracts, sealed or "not sealed, are to be construed and performance "pleaded, according to the intent of the parties." It was, therefore, necessary in this case to make a valid complaint to allege that the plaintiff was ready and willing to receive five million bushels of grain and elevate and store the same. Again they say, "the company

would be in no default unless the appellees would receive "the grain when brought, and as the acts of delivery and "receipt were to be mutual, an averment of readiness by "the appellees is necessary." In such a covenant it is necessary that the plaintiff should suffer damage in order to be entitled to recover, but in this case it is affirmatively shown by the finding of the court that no damage was suffered or could be suffered by the plaintiff in consequence of not receiving into said warehouse the wheat in question. It is affirmatively found by the judge that the elevators during the whole two years were filled to their full capacity; that is, a million bushels, and for that reason they could not receive the balance of the ten millions named in the contract. But this finding also shows that no damage resulted to the plaintiff in consequence of not receiving it. The storage of one million bushels for continuous storage under the special circumstances that they claim prevailed was much more profitable to the plaintiff than it would have been to receive the five million bushels as stipulated in each year. It is found by the court that the first storage of three-quarters of a cent per bushel, which lasted only for ten days, and that for every subsequent ten days the storage was increased a half a cent. The court finds that the storage for the one million bushels continued for one year would amount to $150,000. First storage on five million bushels he also finds would be three-quarters of a cent, which would amount to only $37,000.

Again, no damage resulted to the plaintiffs for the reason that they were unable to receive five million bushels of wheat per annum in store. When the plaintiffs claim damages for the failure of the defendant to deliver the stipulated amount of grain required by the contract,

their right to recover must depend upon the fact that they have performed all the obligations which were imposed upon them by the contract in that respect. It would be monstrous to claim that the defendant must deliver to them, when they were protesting that they would not, and could not receive the grain which they were demanding. Their obligation was just as binding to receive, as it was for the plaintiffs to deliver, and before they can enforce the defendant's undertaking to perform and deliver on his part, it must appear that they were ready, willing and able to receive as was necessary for the performance of the contract, and had the case been tried upon the strict rule of pleading it would have been necessary for the plaintiffs in order to make this claim to show affirmatively, that they were ready and willing and able to receive. In other words, to perform on their part. This is clearly implied in the language of Judge Blodgett in his opinion. The fact that they were wholly unable to perform and refused to perform on their part, was not before Judge Blodgett at all. He treated their allegations of general performance as sufficient for the purposes of their recovery, and stated, that the plaintiffs were not required to aver the performance of any conditions subsequent for the purpose of showing the right of recovery, as the failure to perform conditions subsequent, is a matter of defense to be pleaded by the defendant.

No damage could accrue to the plaintiffs from the fact that the grain was not delivered, if the plaintiffs were wholly unable to receive it, and this fact alone is sufficient to defeat the plaintiffs action.

The third paragraph of the contract provided that the defendant during the period of the contract should de-

liver "on said tracks in cars at said elevator to the "parties of the second part, all the grain that may be "brought by its railway consigned to parties in the city "of Chicago, so far as the party of the first part can "legally control the same for handling and storage in said "elevator."

This agreement is, in all respects similar to the one in the eighth section, and with the same propriety the plaintiffs might claim that during the years 1886 and 1887, the defendant brought over four millions of bushels of grain to Chicago that was not delivered to the plaintiffs, under the terms of the third article. But manifestly if such a claim was made, that this amount of grain, although brought to the city of Chicago and under the control of the defendant, was not delivered to the plaintiffs, because the plaintiffs refused to receive it, was unable to receive it, had not the ability to receive it, this would be a perfect answer in that case, and it is equally an answer to the claim made under the eighth article.

The counsel opposed complain that the evidence in the case has not been preserved. Evidence is of no account, except as proof of facts. Here, the facts are found by the court. Therefore, there was no occasion to preserve the evidence of those facts, as neither party is questioning the finding of the court in that respect. There was no necessity of preserving the testimony of bringing it before this court.

There was a counter-claim or matter of set off pleaded by the defendant in this case to-wit: The amount due it for the rental of the lots for the years 1886 and 1887, and while the plaintiffs case is totally disproved and must fall, the judgment of this court should be a reversal of the plaintiffs claim with directions to the court below to enter

judgment, on the findings of the court in favor of the defendant for the amount due it for rent, as there is no dispute in regard to that.

The court finds that the amount due the defendant at the time of entering its judgment for rent, was $9,022.30, and this court in its judgment should direct that judgment be entered by the court below for that amount with interest, in favor of the defendant.

No new trial is necessary. The facts of the case are found by the court, and no exception is taken to the finding. The findings of the court, therefore, stand. The defendant on the trial below moved for judgment on the findings as made by the court, and, on the court's refusing, excepted to such ruling. This court should now direct judgment in favor of the defendant, on plaintiff's claim, and also give judgment for the amount found due the defendant, or by its mandate to direct the court below to enter such judgment.

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